Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

IN RE: FRED RIGGS, ET AL.,

ON PETITION FOR WRIT OF MANDAMUS AND PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

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QUESTIONS PRESENTED

Does the Navajo Nation qualify as a 'territory', or 'possession', or federal independent contractor, for purposes of 28 U.S.C. §1738[1] full faith and/or credit and comity enforcement of these Navajo Nation orders by this Court by way of an Extraordinary Writ of Mandamus?

Does the Respondents' 'unified defense' so contradict rules of ethical representation that the Petitioners are denied due process and the Respondents' should be prohibited from using the 'unified defense' in Federal Courts by an extraordinary writ of prohibition by this Court?

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[1] The *entire* Navajo Court record, oral and written, sealed and certified from the Navajo Court in compliance with 28 U.S.C. § 1738 requirements is located in the United States District Court, Clerk's Office, 350 S. Main Street, Salt Lake City, Utah 84101-2180, in case docket no. 2:00 CV 0584BJ *MacArthur et al v. San Juan County et al.* Louise York is the contact person.

PARTIES TO THE PROCEEDINGS

Petitioners

Mr. Fred Riggs, Navajo Nation enrolled member C# 18570, residing and working within the Navajo Nation, injured within the Navajo Nation borders.

Mr. Al Dickson, Navajo Nation enrolled member C#212,765, residing and working within the Navajo Nation, injured within the Navajo Nation borders.

Mrs. Donna Singer, married to a Navajo Nation member, residing outside the Navajo Nation, but injured while within the Navajo Nation borders.

All petitioners here are also petitioners in Docket No. 02-1253.

Respondents

San Juan County, 'County', constituent organization, organized under Utah Code 17-50-101 et seq. that SHALL control the San Juan Health Services District (§17A-2-1313(2)) and can withdraw powers from any District governance board member or employee at any time under Utah Code 17A-2-1326 (6).

San Juan Health Services District, 'District', constituent organization, organized under Utah Code 17A-2-1301 – 1332.

San Juan County Commissioner Ty Lewis, officer of San Juan County, under Utah Code 17-16-6, and previous San Juan Health Services District board member, named officially and personally.

San Juan County Commissioner Lyn Stevens, officer of San Juan County, under Utah Code 17-16-6 ,official capacity only, since January 1, 2003, under Navajo and Federal Rule of Civil Procedure at Rule 25.

San Juan County Commissioner Manuel Morgan, officer of San Juan County, under Utah Code 17-16-6, official capacity only, since January 1, 2003, under Navajo and Federal Rules of Civil Procedure at Rule 25.

Bill Redd, previous San Juan County Commissioner, and Health Services District board member, originally named personally and officially, and currently, personally only.

San Juan County Attorney Craig Halls, official under Utah Code 17-18-1, named officially and personally.

San Juan County administrator Richard Bailey and previous San Juan Health District CEO, under 17A-2-1313(2)(a), named officially and personally.

San Juan Health Services District administrative control board member, County appointed , Karen Adams, under Utah Code 17A-2-1326, named personally and officially.

San Juan Health Services District administrative control board member, County appointed, Grant Imel, under Utah Code 17A-2-1326 named officially only under Navajo and Federal Rules of Civil Procedure at Rule 25.

San Juan Health Services District administrative control board member, County appointed, Nettie Prack, under Utah Code 17A-2-1326, named officially only under Navajo and Federal Rules of Civil Procedure at Rule 25.

San Juan Health Services District administrative control board member, County appointed, Cleal Bradford, under Utah Code 17A-2-1326, named officially only, under Navajo and Federal Rules of Civil Procedure at Rule 25.

John Lewis, previous San Juan Health Services District administrative control board member, under Utah Code 17A-2-1326, named both officially and personally, and currently personally.

Roger Atcitty, Navajo Nation enrolled member, previous San Juan Health Services District administrative control board member, under Utah Code 17A-2-1326, named officially and personally, and now personally only.

Previously Commissioner Mark Maryboy and Patsy Shumway were named in their official capacities only, and have since left office and are no longer parties.

Reid Wood, previous San Juan Health Services District executive and employee, under Utah Code 17A-2-1313(2), named personally and officially, and currently personally.

Lauren Schafer is sued as an executive of San Juan Health Services District is named personally and officially.

John Hart, current San Juan District CEO, named official capacity only under Navajo and Federal Rules of Civil Procedure at Rule 25.

Truck/Farmer's Insurance Company the company who had a 1 million dollar bond on Montezuma Creek Clinic that covered Navajo employees at the clinic, and Navajo

Respondent Roger Atcitty, and previous Navajo County Commissioner Mark Maryboy, and employed Mr. Ickes.

Mr. R. Dennis Ickes named in his personal capacity who was hired and represented the respondents, and interests of Truck Insurance.

And any other Jane and John Does, and any agent or assigns for the above named Respondents, all named jointly and severally.

All respondents, by implication or expressly, filed cross-petitions in Docket no. 02-1444 (County) and 02-1445 (District).

All respondents were Navajo Court non-compulsory counterclaimants.

Additional Parties Below

Dr. Steven MacArthur, Michele Lyman, Helen Valdez, Candace Laws, Paul Kieth, Dorothy Kieth, Baxter Benally, Percy Mitchell, Melvin Capitan, Candace Holiday, Eva Pleasant, Amy Terlaak and Linda Cacapardo were additional Federal Court Plaintiffs, but were not parties to the Navajo Nation Court action.

Cleal Bradford, John Housekeeper, Gary Holiday, Dr. James Redd, Dr. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Laurie Wallace, Carla Grimshaw, Gloria Yanito and Julie Bronson were additional Federal Court defendants below, for federal and state claims, but were not parties to the Navajo Nation Tribal Court.

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*Most case cites herein are by LEXIS.

The 10th Circuit Court issued *MacArthur et al v. San Juan County et al*, 2002 U.S. App. LEXIS 20987,*;309 F.3d 1216 (2002) (EW P. Ap. 121a). The Federal District Orders appealed were entered on October 30, 2000 and was certified for interlocutory appeal on March 7, 2001 under F. R. Civ. P. 54(b). (EW P. Ap. 169a, 209a) and the order Dismissing Truck and Mr. Ickes December 12, 2000 (EW P. Ap. 195a). The Petitioners are seeking enforcement of the Navajo Court orders of December 28, 1999 a Preliminary Injunction (EW P. Ap. 1a-32a) ; March 1, 2000 an order denying the respondents motion to dissolve or modify the Injunction (EW P. Ap. 33a- 52a); March 2, 2000 order (53a-54a); and March 15, 2000 order binding Truck Insurance and Mr. Ickes to the defendants for the harms associated with bad faith litigation. (EW P. Ap. 55a-57a). The Tenth Circuit Court denied the Petitioners petition for a writ of mandamus (EW P. Ap. 119a ; EW P. L. 226-263) seeking full faith and credit enforcement of these Orders. *The Navajo Injunction and subsequent orders cite to no relief beyond Navajo law relief.* (EW P. Ap. 1a-60a).

LINKED APPEALS

The petitioners timely filed an appeal of *MacArthur et al v. San Juan County et al*, 2002 U.S. App. LEXIS 20987,*;309 F.3d 1216 (2002) in docket no. 02-1253. Respondents cross-petitioned in 02-1444 and 02-1445. Petitioners erroneously stated in their reply brief that Respondent County did not file a brief in opposition to the Petitioners' petition. In fact, the County respondents did file a response, unified with the District written by one law firm. Petitioners apologize for this error.

JURISDICTION

This Court has jurisdiction by court rule 20; by way of 28 U.S.C. §1651 (a) and 28 U.S.C. § 1738 the full

faith and credit statute; 28 U.S.C. §1362 [1] ;25 U.S.C. §1902 protecting 'best interests' of Indian children'(EW P. Ap. 42a), Treaty of 1848 and 1868 and the United States has a fiduciary duty to the Tribes to protect the people. *Worcester v. Georgia*, 1832 U.S. LEXIS 489,*;30-32; U.S. 515; 8 L. Ed. 483(1832).

NAVAJO NATION COURT JURISDICTION

By Treaties of 1849 and 1868 [2], Congress mandates that the Navajo Nation shall govern by inherent sovereignty within the exterior bounds of today's Navajo reservations without exception for the types of land titles or race or national origin. 18 U.S.C. §1151, 25 U.S.C. §1302(8). 7 N.N.C. §254 The Navajo Court, exercising its inherent powers, has jurisdiction based upon: "a territorial premise" (EW P. AP. 1a, 30a, 45a) [3]; "Montana v. United States, 450 U. S. 455 (1981) and ... Strate,.... v A-1Contractors, (EW P. Ap. 2a,28a, 45a) .... 7 NNC 253(B) (EW P. Ap. 2a) ; Rule 65 of the Navajo Nation Rules of Civil Procedure (EW P. Ap. 2a, 4a, 15a, 39a)[4] ; Navajo Code (EW P. L. 90 7N.N. C. 255,

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[1] Under" Section 1362,..... we should not lightly restrict the authority granted the tribes to defend their own interests."*Blatchford v. Native Village of Noatak*, 501 U.S. 775, 793-795 (1991)(J. Blackman dissenting). To not provide full faith for individual Indians, annihilates Tribes' efforts to defend their own interests, as Court orders become useless.

[2] Treaties are "not a grant of rights to the Indians, but a grant of rights from them – a reservation of those not granted." *U.S. v. Winans*, 198 U.S. 371, 381 (1905).

[3] *See, United States v. Enas*, 2001 U.S. App. LEXIS 14397,*46;255 F.3d 662 (2001)(*unanimous en banc*) *cert denied*, 122 S. Ct. 925, (2002) (under ultimate plenary control of *Congress)*. Also, *Binns v. United States*,_194 U.S. 486, 491 (1904) ("It may ....*transfer* the power of such legislation to a legislature elected by the citizens of the territory"); *Mormon Church v. United States*,136 U.S. 1, 42-43 (1890) (..No state of the Union had any such right of sovereignty over them; no other country or government had any such right.).

[4] Undisputably, the Navajo Rules of Civil Procedure nearly mirror the Federal Rules of Civil Procedure and the Navajo Nation has

256); violations of "civil and personal rights protected by the Navajo Nation Bill of Rights, notwithstanding the 1968 Indian Civil Rights Act (EW P. Ap. 16a, 27a, 35a, 44a, 46a)[5] ; and inherent sovereignty (EW P. Ap. 27a, 45a)[6] ; Navajo Nation code (EW P. Ap. 2a, 45a) [7]; customs and traditions (EW P. Ap. 28a, 44a, 47a, 60a)[8] ; Navajo Preference in Employment Act violations (EW P. Ap. 5a,7a, 10a, 18a, 19a, 20a, 23a, 26a); the Navajo Court's contempt powers (EW P. Ap. 47a-51a, 54a) and protection of Navajo elderly and grandchildren (EW P. Ap. 42a)[9] ; Navajo public contracts (EW P. Ap. 16a, 28a,), I.H.S. contracts (EW P. Ap. 23a, 28a, 42a); illegal billing[10] of Navajo patients going to an I.H.S.

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adopted the ABA Model Rules of Professional Conduct. (EW P. Ap. 133a).

[5] Mandated by the Indian Civil Rights Act 25 U.S.C. §§ 1301-1341, most particularly 1302(8) requiring equal protection of the law for any persons.

[6] Privileged by Treaty and inherent sovereignty predating the coming of European settlers to their land. *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) (en banc) (footnote omitted).

[7] A three branch form of government was adopted in 1990 creating the Judicial branch and the codes under which it operates. Office of Navajo Government Development, Navajo Nation Government 9 (4th ed. 1998) at page 15. There is a six volume 24 Title code today. *Id.* The Preface to the Navajo Nation code indicates the three branch form of government is more closely aligned with historic government by Navajo culture and traditions. Navajo Nation Code at ix (1995).

[8] Privileged by the Treaty of 1868 "...and settled doctrines of the law of nations is, that a weaker power does not surrender its independent–it's right to self-government – by associating with a stronger, and taking its protection.." *Worcester v. Georgia*, *supra*, and protected by the *Navajo Nation code Id. fn. 9 at 29.*

[9] 25 U.S.C. §1902

[10] Public law 102-573, "Sec. 222 (a) A **Patient** who receives contract health care services that are authorized by the Service Unit CHS [Contract Health Services] **shall not be liable** for payment of any charges or costs associated with the provision of such

independent contractor facility, and by the Respondents filing counterclaims seeking the Navajo Court's jurisdiction (EW P. Ap. 23a, 35a, 45a, P.L. 274 et al) by which the Court, under 25 U.S.C. §1302(8) had to provide the respondents with the full protection of Navajo law, not only as defendants, but as plaintiffs in the action, who had quasi-contracted with the Navajo Courts by paying the Plaintiffs' filing fee. As Justice Holmes wrote for the Court, a "suit arises under the law that creates the cause of action." *Nat'l Farmers* at 851. As in this injunction, Indian Civil Rights claims, Navajo law violations belong in Navajo Court. All *Montana*, 565-566, exceptions are met.

The Navajo Court fine orders, (EW P. Ap. 51a-52a) are warranted (1) to stop injuries to the Navajo patients being billed who stopped going to facilities for health care believing they had to pay or produce their CIB [certified degree of Indian blood], that was likened to dog tags, (EW P. Ap. 116-117) (2) to stop the ongoing damages to the Navajo petitioners, of long prolonged litigation, based upon the Navajo Court's reliance upon the false assertions of the respondents, their attorney, as funded by Truck Insurance on May 14, 1999. (EW P. Ap. 10a, 20a, 21a, 22a, 23a, 24a, 51a-52a, 55a-56a). Standing of the Petitioners to raise Navajo Patient claims was found in Navajo Nation common law and traditions of clan systems, and also Navajo judicial doctrine. *Halona v. Navajo Nation*, 1 Nav. R. 189, January 24, 1978 [11] . (EW P. Ap. 16a-18a) When Navajo Nation citizens are endangered, standing for all persons to report the endangerment, lies in 'the familial duties as found among other tribes that remain likewise in their nearest to original condition in respect to their customs and traditions....." EW P. Ap. 17a. Any Court

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services....." Id. Emphasis Added. Not to mention Medicaid prohibitions.

[11] http://www.tribal-institute.org/opinions/1978.NANN.0000002.htm

infringement upon these express Congressionally guaranteed authorities, violates Article III restrictions over Treaty-protected Indian Nations. Fn.2, *supra.*

STATEMENT OF THE CASE

On or about April 12, 1999, in Navajo Court the Petitioners filed an Application for a Preliminary Injunction (EW P. Ap.70a) and a Complaint (EW P. L. 36) with 60+ attachments, identifying as nearly as possible the time, place, and persons involved in the Petitioners' Navajo law injuries. [12] The Respondents, represented by Navajo Bar Counsel, and duly served, filed two 'Answers' raising the defense of state sovereign immunity, with non-compulsory counterclaims of Navajo common law fraud, theft, and the like against Petitioner Singer, allegedly occurring at Montezuma Creek Clinic, and paid the court filing fee. (EW P. Ap. 35a, 23a, 45a). These Navajo common law fraud and theft claims, filed in violation of Navajo Nation Rules of Civil Procedure at rule 9, with lack of specificity as to amount, time, place, (EW P. Ap. 23a, P.L. 288-301), were found to <u>be totally false.</u> (EW P. Ap. 13a-14a, 41a,). *See,* comparable Federal Rule of Civil Procedure at Rule 9 requiring pleading fraud with specificity. [13] A TRO was issued initially on April 12, 1999, and then lifted in a

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[12] In the Complaint, to the degree the state nonfeasance, malfeasance, and misfeasance claims are found, Petitioners acknowledge the Navajo Court will have no authority to rule upon them as state claims, but they do serve as a backdrop to understand the level of deliberateness of harm by these quasi-municipal organizations and officers. Otherwise, all tort claims are Navajo tort claims See, 7 N.N.C. 701, *infra.*

[13] A review of the record will show that *the Navajo Court was as patient and objective and respectful to the respondents' and their claims as possible until the entire facts were heard over nine months of hearings, and decided by the Court, after evidence and witnesses in the Navajo Court's presence convinced the Court that Navajo and non-Navajo were being injured in Utah's Navajo land.*

hearing on May 14, 1999.[14] The The Navajo Court lifted the TRO based upon the Respondents' and their counsel's false assertions to the Navajo Court on May 14, 1999. (EW P. Ap. 25a, 46a). [15] On December 28, 1999, ***after about nine months*** of about 32 hours of hearings and about 14,000 pages of documents, with live witnesses, and without any restraints whatsoever upon the defendants (EW P. Ap. 25a, 34a, 37a), save hiring a Navajo Court approved reporter (Id.), the Navajo Nation District Court issued an injunction order finding ongoing irreparable harm by the respondents. (EW P. Ap. 1a et seq.). After motion and Court order, on March 14, 1999, Petitioners amended and modified their Complaint naming Truck insurance and Mr. Ickes counsel, for the harms the Petitioners suffered in Navajo Court directly resulting from bad faith litigation in

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[14] TRO was lifted amidst Respondents sneers and jeers toward the Petitioners (EW P. Ap.3a, 25a) and calling them 'bold faced liars' (EW P. Ap. 25a), and amidst *admitted* false denials of shutting down Montezuma Creek Clinics' lab, pharmacy services, and shutting down the ambulance garages and prohibiting EMT personnel in responding to emergencies, and without apology. (EW P. Ap. 46a). Significantly, two Navajo chapters alerted the Court to the pending harm to area Navajo residents if Mrs. Singer, manager of Montezuma Creek Clinic, and Fred Riggs, bilingual Physician Assistant, (suspended, labeled with committing fraud, at the time) were not replaced in their jobs. (EW P. Ap.3a, 18a, 233a-240a). Time Card errors were the alleged 'fraud', though Petitioner Riggs was filing out his first time card ever in 30 years. He and Petitioner Singer as a manager were found to be exempt from time cards. (EW P. Ap. 8a, 22a). District Administrator respondent Shafer admitted that after nine months of 'scrupulous examination' there was not one piece of evidence of Mrs. Singer's alleged intent to commit fraud. (EW P. Ap. 13a-14a).

[15] For nine months thereafter in numerous hearings, the Navajo Court *continued* giving Respondents deference and presumptions of good faith, even over Navajo Chapter's resolutions, and admitting all respondents evidence into the record (EW P. Ap. 12a), without restraint except to use a *Navajo* court qualified reporter, if they wished. (EW P. Ap. 34a-35a).

which both Truck and Mr. Ickes were found to have participated with all the other respondents. (EW P.L. 36-86) (EW P. Ap. 55a).

The 10th Circuit factually erred (EW P. Ap. 142a, 34a, 36a) in finding Truck and Ickes had no contracts with Indians or the Tribe[16]. Under Navajo law, identical to Congressional acts, a finding regarding the race or national origin of a party, for dispensing justice or relief, is unessential, and *prohibited*, as long as they are injured or cause an action to occur in Navajo Indian country. 7 N.N.C §§253, 254, 701. See, *S.R.I. v. Pollaca*, SC-CV-86-96, Navajo Nation Supreme Court, August 22, 2000. (EW P. L. 118-127, 122-123). 25 U.S.C. §1302(8), Navajo Nation Bill of Rights.[17]

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[16] Truck and Mr. Ickes had contracts involving District respondent Roger Atcitty, a Navajo Nation member residing on the reservation. Truck's contract with the respondent district for Montezuma Creek clinic was inherent in every contract for services with thousands of Navajo patients and would necessarily have covered the doctors, exray technician Petitioner Singer, and Mr. Riggs as a Physician's Assistant. But for that insurance, Montezuma Creek clinic could not have contracted with thousands of individuals.

[17] **Navajo Nation Bill of Rights**

1. Other rights not impaired; deletion or abridgment only by public referendum.

The enumeration herein of certain rights, shall not be construed to deny or disparage others retained *by the people*. No provision of this chapter, the Navajo Nation Bill of Rights, shall be abridged or deleted by amendment or otherwise, except by referendum vote of the Navajo electorate, in accordance with applicable provisions of the laws of the Navajo Nation.

2.. **Equality of rights not abridged by entitlements, benefits or privileges; nor by affirmative action necessary to support rights of the Navajo People to economic opportunity.**

Recognition, enactment, lawful implementation and enforcement of provisions for specific entitlements, benefits, and privileges based upon membership in the Navajo Nation or in other recognized Tribes of Indians and affirmative action in support of *Navajo or other Indian preference in employment* and business contracting or otherwise necessary to protect and support the

No lower court has yet to find the Navajo Court was in clear error for finding Truck and Mr. Ickes were involved with the defendants in harming the Petitioners in bad faith litigation. (EW P. L. 55a-56a) or that there was any lack of due process. [18] Mr. Ickes did not exhaust his tribal remedies prior to federal relief, so he waived them.

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rights of Navajo People to economic opportunity within the jurisdiction of the Navajo Nation, shall not be abridged by any provision herein not otherwise be denied.

3. **Denial or abridgment of rights on basic of sex; equal protection and due process of Navajo Nation law.**

Life, liberty, and the pursuit of happiness are recognized as fundamental individual rights of *all human beings*. Equality of rights under the law shall not be denied or abridged by the Navajo Nation on account of sex nor shall *any person* within its jurisdiction be denied equal protection in accordance with the laws of the Navajo Nation, nor be deprived of *life*, *liberty* or *property*, without *due process of law*. Nor shall such rights be deprived by any bill of attainder or ex post facto law.

4. **Freedom of religion, speech, press, and the right of assembly and petition.**

The Navajo Nation Council shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of people preaceably to assemble, and to *petition the Navajo Nation government for a redress of grievances...*

7. **Rights of accused; trial by jury; right to counsel.**

..... nor shall *any person* be denied the right to have the assistance of counsel, at their own expense, and to have defense counsel appointed in accordance with the rules of the courts of the Navajo Nation upon satisfactory proof to the court of their inability to provide for their own counsel for the defense of any punishable offense under the laws of the Navajo Nation.

Emphasis added.

[18] The reservation of rights letters show that Truck would have investigated the charges, and Mr. Ickes would keep Truck fully appraised of the litigation at all times. (EW P. L. 13-25). Undoubtedly, Mr. Ickes knew or should have known his assertions in the defendants behalf were deceptive to the Court, harming the petitioners, and harming the patients and citizens and Navajo public policy, as later admitted. (EW P. L. 13-25, EW P. Ap. 55a-57a).

On March 1, 2000 a second order, (EW P. Ap. 33a) denying the Respondents motion to dissolve or modify the Navajo Nation's Court's injunction order, was issued after the Respondents totally ignored the December 28, 1999 order for about three months, while on notice that the billing processes were driving diabetic patients in need of continuous care for a lethal disease away from their health care (EW P. Ap. 3a, 18a, 25a, 31a, 50a) and that Petitioners were suffering irreparable harm (EW P. Ap. 16a, 20-21a, 28a, 39a) to their reputations and finance, and the Court found endangerment to the Navajo public (Id. 51a). The Court found that due to Respondents producing no credible evidence of fraud, deceit, or theft, or rebutting the Petitioners facts, the findings of the Court in the injunction became the *judgment as to the merits of those portions* of the case in chief for the claims addressed in the injunction under Navajo Nation Rule of Civil Procedure at Rule 65. (EW P. Ap. 39a, 40a, 41a, 43a)[19]. This March 1, 2000 order had a fine attached of $10,000 dollars a day, of which $1000 was to come from Respondents' personal assets, **if** the orders were not obeyed. (EW P.Ap. 51a). The Navajo Court wanted the lethal endangerment to Navajo people to stop and after studious detailed study, saw no facts or law upon which the respondents' defenses could be well grounded. On March 2, 2000, a Special order in aid to satisfaction of Preliminary Injunction was issued. (EW P. Ap. 53a-54a). This order allows the Petitioners to seek help in federal court under comity or '*any* applicable law' to enforce the orders.(EW P. Ap. 54a). The fines were within the respondents control to end at any time.

On March 15, 2000 the Navajo Court issued another order (EW P. Ap. 55a-56a) to bind the

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[19] See similarly Federal Rule of Civil Procedure at Rule 65 for allowing evidence in an injunction hearing to go to the merits of the case.

Respondents Truck and Mr. Ickes with the Respondents as they were found to have acted in concert with the defendants prior to the injunction order's issuance. If this idea offends this Court, irregularities or errors in Navajo Courts are corrected by the Navajo Courts of which Truck and Mr. Ickes did not fully advantage themselves. (EW P. Ap. 55a-56a). *Cornells v. Shannon*, 63 F. 305, 306- 307 (8th Cir. 1894); 1894 U.S. App. LEXIS 2387.

Navajo proceedings have been stayed. The Navajo Court on April 30, 2003 clarified that the fines of March 1, 2000 that are ongoing will be used to compensate injured persons and are not penal in nature. (EW P. Ap. 60a). Petitioners will move the Navajo Court for a dialysis/hospice center to be built with the Court fines since the Montezuma Creek clinic area patients must travel 65-100 miles one way for frequent dialysis in Shiprock, New Mexico. (EW P. Ap. 152a). The harms to Petitioners and Patients is ongoing. (EW P. Ap. 143a-168a). The Federal Court gave municipal respondents state sovereign immunity by cloaking them with state immunity law. EW P. Ap. 178a. The 10th Circuit Court reversed, finding no state sovereign immunity in determining Tribal jurisdiction (EW P. Ap. 139a) and finding no inherent state authority over Indian Tribes, then conflictingly remanding the case back to federal court for a subject matter jurisdictional analysis prior to a immunity argument. (EW P. Ap. 140a).

STATUTES OR OTHER PROVISIONS INVOLVED

28 U.S.C. § 1738—Full Faith and Credit

"The records and judicial proceedings of *any* court of any such State, Territory or Possession, or copies thereof,...*shall* have the same full faith and credit *in every court* within the United States *and* its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken "

Sec. 1151. - Indian country defined

....the term "Indian country", as used in this chapter, means **(a) all land** within the limits of any Indian reservation under the jurisdiction of the United States Government, **notwithstanding** the issuance of **any patent**, and, including **rights-of-way** running through the reservation,**(b)** all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and ....

NAVAJO LAW

7 Navajo Nation Code (N.N.C.) §254. Territorial Jurisdiction

The territorial jurisdiction of the Navajo Nation shall extend to Navajo Indian Country, defined as all land within the exterior boundaries of the Navajo Indian Reservation or of the Eastern Navajo Agency, all land within the limits of dependent Navajo Indian communities, all Navajo Indian allotments, and all other land held in trust for, owned in fee by, or leased by the United States to the Navajo Nation or Band of Navajo Indians.

History: "...'all land' is comprehensive and includes rights-of-way, fee land, and any other lands, notwithstanding the nature of title thereto within the exterior borders of the Navajo Nation, Eastern Navajo Agency, dependent Navajo communities, Navajo Indian allotments.... " EW P. L. 100, 100-1, 100-2, 100-3, 100-4.

7 N.N. C. § 701

A. In all civil cases, judgment shall consist of an order of the court awarding money damages to be paid to the injured party, or directing the surrender of certain property to the injured party, or the performance of some other act for the benefit of the injured party or the a declaration of rights of the moving party.

B. Where the injury inflicted was the result of carelessness of a party, the judgment shall fairly compensate the injured party for the loss he has suffered.

C. Where the injury was deliberately inflicted, the judgment may impose additional penalties in favor of the injured party or in favor of the Navajo Nation.

D. Where the injury was inflicted as the result of accident, or where both the plaintiff and the defendant were at fault, the judgment may compensate the injured party for a reasonable part of the loss he has suffered.

7 N.N.C. § 204 Law Applicable [20]

A. In all cases the Courts of the Navajo Nation shall apply any laws of the United States that may be applicable and any laws or customs of the Navajo Nation not prohibited by applicable federal laws.

B. Where any doubt arises as to the customs and usages of the Navajo Nation the court may request the advice of counselors familiar with these customs and usages.

C. Any matters not covered by the traditional customs and usages or laws or regulations of the Navajo Nation or by applicable federal laws and regulations, may be decided by the Courts of the Navajo Nation according to the laws of the state in which the matter in dispute may lie.

7 N.N.C. § 253. Jurisdiction- Generally

B. Civil causes of action. All civil actions in which the defendant is a resident of Navajo Indian Country, or has

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[20] Congress has never limited Tribal court jurisdiction to hear federal or international treaty law claims by which Navajo tribes are confined by Treaty. Plaintiffs agree with Justices Breyer and Stevens concurrence in *Hicks, supra* *85.

caused an action to occur within the territorial jurisdiction of the Navajo Nation. [21]

*All the foregoing is equally applicable to the petition for the Writ of Prohibition below.

ISSUE 1. The Navajo Nation qualifies as a 'territory', or 'possession', or independent contractor, for purposes of 28 U.S.C. §1738 full faith and credit and/or comity enforcement of these Navajo Nation Court orders, by this Court, by way of an Extraordinary Writ of Mandamus.

WHY THIS PETITION FOR MANDAMUS SHOULD BE ACCEPTED

"In short, the modern Navajo Nation is faced with nothing less than the threat of cultural, economic and political genocide." Statements of Navajo Nation Chief Justice Robert Yazzie at the 2002 Senate Indian Affairs Committee hearings. (EW P. Ap. 212a-232, at 214a-215a). Indian law is in conflict and crisis, here people's lives are being irreparably harmed and endangered and need *immediate* relief (EW P. Ap. 62a et seq, 145a-157a, EW P.L. 128-130 and 270), and the entire United States needs this Courts *immediate* guidance. The acts of Congress[22] drain or fill the cup of sovereignty of the Navajo Nation by express *limitations* on full inherent sovereign authority reserved to our sister Indian Nation sovereigns as held in a fiduciary trust by the United States to release or withdraw as it best benefits the Indian Nation. *Enas, supra*, *46. The vessel is filled by

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[21] "...Due process of law *requires* that the Navajo Nation extend the protection of its law to all individuals....." *SRI v. Pollaca*, Navajo Nation Supreme Court, August 22, 2000. At pg 5 . EW P. L. 118-127.

[22] "A tribe's inherent powers include those powers historically recognized as inherent, *plus* those powers that Congress, in the exercise of its plenary power under the Indian Commerce Clause, recognizes as inherent in the tribe's sovereignty." *Enas*, fn.4.

Congress, drained by this Court, and petitioners, Navajo and Federal Courts appear stuck in the middle.

Filling the Vessel of Sovereignty

The vessel is being filled by Congress[23] , the Executive Branch [24], and the International community[25] by treaty with the United States as a party signatory. The acts passed by Congress as authorized under the Indian Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, facilitate, protect, and fund the free exercise of Indian Tribal inherent sovereign authority over non-Indians[26],

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[23] By way of 25 U.S.C. §§ 450, 450a, 450e, 1301, 1302, 1302, 3601, 3602, 3631, 3651, 3663.

[24] By Executive Orders Executive Order 13175 November 6, 2000 President Clinton Sec. 2 among others; Presidential Memorandum to Department Heads of April 29, 1994 (EW P. L. 115); BIA Navajo Judicial program contract EW P. L. 102-115 and signing international treaties dealing with aboriginal peoples fn. 25,below.

[25] **United Nations International Covenant on Civil and Political Rights**, (UNICPCR)2200A (XXI) of 16 December 1966 *entry into force* 23 March 1976, in accordance with Article 49. The United States has committed to this international body to 'promote the realization of the **right** of self-determination and shall respect that **right**, in conformity with the provisions of the Charter of the United Nations. " for *persons* on trust lands. UNICPCR Part 1, Article 1, sec. 3. The Courts shall apply the laws to 'everybody' equally. Part III , Article 14, Sec.1. United Nations Charter CHAPTER XI, DECLARATION REGARDING NON-SELF-GOVERNING TERRITORIES, Article 73, charging the United States with a 'sacred trust obligation' (24 Oct. 1945).

[26] The Senate Report accompanying the Tribal Justice Support Act, 25 U.S.C. 3601 et seq. explained that "**tribal courts are permanent institutions *charged with resolving the rights and interests of both Indian and non-Indian individuals.***" S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993). Emphasis added. And the Conference Report stated that "civil jurisdiction on an Indian reservation *'presumptively lies in tribal court, unless affirmatively limited by a specific treaty provision or federal statute.*'" H.R. Conf. Rep. No. 383, 103d Cong., 1st Sess. 13 (1993) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)). See also Indian Tribal Justice Technical and Legal Assistance Act of 2000,(25 U.S.C. 3651), §§ 2, 101, 106, 201, 202, Pub. L. No. 106-559,

while *expressly* divesting Indian Tribes of authority to deny equal protection of their laws for any 'person', expressly not any 'Indian' [27], who seeks the protections of the Navajo laws for injuries within Indian Country. *See*, 25 U.S.C. § 1302(8) and 18 U.S.C. § 1151 (Congress defines Indian Country identically to the Navajo Nation 7 N.N.C. §254, specifically not excepting 'patent' or ' right of ways' from Tribal jurisdiction).[28]

Draining the Vessel of Sovereignty

Alternatively, after about 200 years of Indian case law, this Court drains the vessel of Tribal sovereignty by the 'implicit divestiture' doctrine originating in 1978's *Oliphant v. Squamish Indian Tribe*, 1978 U.S. LEXIS 66,* 26;435 U.S. 191; 98 S. Ct. 1011;55 L. Ed. 2d 209(1978) ('intrinsic limitations on Tribal authority') [29] ; and in 1981, *Montana v. United*

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114 Stat. 2778. Congress and the Executive *expressly divests* Navajo Court inherent sovereign of unequal law application, based upon national origin, race, residency, and land ownership, by 18 U.S.C. §1151.

[27] 25 U.S.C. §1302 (8); *Dodge v. Nakai*, 298 F. Supp. 17 (D. Ariz. 1968)

[28] Notably the Tribal Justice Support Acts and 2000 amendments thereto, post date *Montana* by nearly twenty years and find presumptions for Navajo jurisdiction over non-Indians in Navajo Indian Country. Fn.26

[29] "When a Tribe grants a Non-Indian the right to be on Indian land, the Tribe agrees not to exercise its ultimate power to oust the Non-Indian as long as the non-Indian complies with the initial conditions of entry. However, it does not follow that the lawful property right to be on Indian land also immunizes the Non-Indian from the Tribe's exercise of its lesser-included power to tax or *to place other conditions* on the non-Indian's conduct or continued presence on the reservation" ....."[n]either the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners."

States, 450 U. S. 544, 565-566 (1981) (presumption against Tribal jurisdiction over non-Indians); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997)(no tribal jurisdiction over dangerous driving by non-Indians); *Atkinson Trading Post v. Shirley*, 2001 U.S. LEXIS 4116,*;532 U.S. 645;121 S. Ct. 1825;149 L. Ed. 2d 889, 121 S.Ct. 1825 (2001)(a ill defined, unpredicted, and ambiguously applied 'nexus' test *18, reiterating *Montana*'s presumption against jurisdiction *5, despite the Indian Tribal Justice Technical and Legal Assistance Act of 2000" 25 U.S.C. § 3651(5), (6), mandating a *presumption for* Tribal jurisdiction); and *Nevada v. Hicks*, 2001 U.S. LEXIS 4669,*;533 U.S. 353;121 S. Ct. 2304;150 L. Ed. 2d 398, 121 S.Ct. 2304 (2001)(finding of a heretofore unknown "State's inherent jurisdiction' *22-23, over tribes[30] that never existed when Article VI of the Constitution was passed or in any enabling acts of the States or in the thorough examination of Justice Marshall in *Worcester*, *supra*).

Federal protection of Navajo Court orders for Navajo law violations, within Navajo borders[31], on land held in trust for Navajo people by federal mandate [32], and

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Merrion v. Jicarrilla Apache Tribe, 455 U. S. 130, 143, 145 (1982) J. Marshall writing for the majority. Emphasis added. This postulate is found in 18 U.S.C. §1151, that makes no exception for land titles, and 25 U.S.C. §1302 making no exceptions for race or national origin.

[30] " State imment domain cannot 'avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. " *Cherokee Nation v. Southern Kan. R. Co.* 135 U. S. 641, 656(1890). See also the entire 1968 Civil Rights Act 25 U.S.C. 1301 et seq.

[31] **Navajo Nation** trust land at (a) Montezuma Creek Clinic, Montezuma Creek, Utah, (b) **Navajo Nation** Court in Shiprock, New Mexico, and (c) hundreds of homes of **Navajo Nation** citizens receiving illegal bills.

[32] The Utah **Navajo** *'trust'* fund owned, but not operated, Montezuma Creek Clinic and land. The clinic and land were bought and paid for with **Navajo** money from **Navajo** *un*renewable

bought from royalties from their non-renewable Utah Navajo resources. Full faith and credit harmonizes with Congress' and the Executive's filling the vessel. See, Inyo County, Ca. v. Paiute-Shoshone Indians of Bishop, 538 U.S. _____, pgs. 6-8, fn.6 (May 19, 2003)(Indian Nations are 'states' and 'territories' for 1983 use).

Full Faith and Credit enforcement of these orders will not effect Utah's sovereignty. [33] Nor are these quasi-municipal political subdivisions the state or immune for 'nearly all statutory or constitutional analysis."[34]. "Neither here can one presume that "Congress intended to repeal municipal liability *sub silentio* by the very Act[s] it passed to strengthen the" Tribal Court's " hand." *Cook*, *supra*. 25 U.S.C. 450, 450, 1301, 1302, 1302, 3601, 3602, 3631, 3651, 3663. *Cook* at 13. *See*, also, *Jinks v. Richland County, South Carolina*, 538 U.S. _____ (April 22, 2003, slip opinion.) The clear reference in 1302(8) to 'any person' when Congress could said 'Indian' shows Congress'

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oil and gas royalties paid under Federal statute P.L. 72-403, 47 Stat. 1418, placed into the Utah **Navajo** Trust Fund, a *private purpose fund* (Utah Code §63-88-102 et seq.), under the federally imposed fiduciary duty of Utah (§63-88-103(3)(g)), for the Utah **Navajo** people. It is land held in trust for **Navajo** people not freely alienable by the State, *by federal mandate*.

[33] Utah..."forever disclaim[s] all right and title ....to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under *the absolute* jurisdiction and control of the Congress of the United States". *Utah Enabling Act*, *supra*. *See, also* Utah code 9-9-208, 209. emphasis added.

[34] *Lyon v. Burton*, 2000 Utah LEXIS 20,*:2000 UT 19; 5 P.3d 616;387 Utah Adv. Rep. 27 (2000)¶80. *See, Cook District v. United States ex rel Chandler*, 538 U. S. ____ (March 10, 2003 docket no. 01-1572, slip opinion) at page 7. Emphasis added.

presumption of Indian Nation authority over non-Indians on an equal basis with Indians. *Dodge, supra*

Petitioners and Lower Courts are Caught in the Conflict Between Congress' Plenary Power and This Court's Judicial Doctrines

Any ruling below will be in violation of some source of law. This Court's rulings appear to break with other sources of law and stare decisis prior to 1978 in *Oliphant*'s[35] ruling, based upon applying *Fletcher v. Peck*[36], *dissenting* J. Johnson's opinion. Previously, this Court relied upon the majority opinion in *Worcester v. Georgia*[37] as a basis for Indian inherent authority. The 10th Circuit Court demonstrates this conflict.

> "Today, tribes retain sovereignty of a unique and limited character. It exists only at the *sufferance* of *Congress* and is subject to complete defeasance. But until

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[35] See, *Enas*,*17-18, wherein Congress rewrote the underlying historical presumptions of *Oliphant* and progeny explicitly. Such presumptions of sovereignty postdate Montana and progency and should apply here.

[36] 1810 U.S. LEXIS 322,*;10 U.S. 87; 3 L. Ed. 162;6 Cranch 87. The case dealt solely with soil and with Indian ownership rights of the soil, not their authority over non-Indians otherwise. The presumption against authority over non-Indians has arguably been reversed by Congress in repairing the *Duro* ruling. Enas*45.

[37] 1832 U.S. LEXIS 489,*;31 U.S. 515;8 L. Ed. 483, a case examining Article III restraints, Congress' plenary powers over Indians, history of the powers, intent of the framers, and Indian and state authority over white people *60, within their tribal areas, as is very specific to this case's issues. "[T]he United States of America acknowledge the said Cherokee nation to be a sovereign nation, authorised to govern themselves, and all persons who have settled within their territory, free from any right of legislative interference by the several states composing the United States of America, in reference to acts done within their own territory" *54. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected....." *80. *Id.*

> *Congress* acts, the tribes retain their existing sovereign powers. In sum, Indian Tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status"

MacArthur, (EW P. Ap. 129a). Emphasis added.

Like an oxymoron, we see Nation sovereignty ONLY at the sufferance of *Congress*, and yet withdrawn by judicial 'implication'. "Congress has the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law." *Enas*, *27. Those powers mean nothing without a Federal Court's enforcement of the expanse of inherent sovereign authority granted by Congress.

It is striking to contrast this Court's;

– denial of certiorari in *Wilson v. Marchington*, 127 F.3d 805;1997 U.S. App. LEXIS 25994;97 Cal. Daily Op. Service 7553;97 Daily Journal DAR 12175Certiorari Denied April 20, 1998, Reported at: 1998 U.S. LEXIS 2555 (denying full faith and credit of Blackfoot Court); and about a year later,

— denial of certiorari in *Halwood v. Cowboy Auto Sales*, New Mexico Supreme Court, 946 P. 2d, 1088 (1997) *cert denied*, Docket No. 98-858, February 22, 1999) (giving full faith and credit and comity to a Navajo Court punitive damage award against an off-reservation non-Indian auto sales business).[38]

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[38] They had full knowledge, these harms were intentional, deliberate, and malicious. (EW.P. AP. 61a-69a, 145a-154a, 155a-157a, 158a-168a, EW P. L. 270); "The Navajo Tribal Court's decision to grant punitive damages in this case is not at odds with New Mexico law on the subject. Punitive damages may be awarded where the wrongdoer's conduct is "'maliciously intentional, fraudulent, oppressive, or committed recklessly or with a wanton

Marchington dealt with the *Blackfeet* tribe (Id. *1) , *Halwood* the Navajo tribe, at issue in this case. *Marchington* finds "...states and [Indian Nations]...have no direct power to enforce their judgments in each other's jurisdictions." *Id.* at *3-4. *Halwood* *in reality*, ***PROVES*** the *exact* opposite[39]. *Marchington* *viewed* Indian Tribes as a *foreign* country[40] Id. *4, ignoring Federal control analysis. *Halwood* viewed the Navajo Nation as a sister sovereign with which to cooperate and respect [41]. *Marchington* noted the 1804 amendment to §1738 's original statute to include territories and possessions ....while entirely writing off the Supreme Court's interpretation of the 1804 amendment favorable to Indian tribes. *Id.* *6.

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disregard of the plaintiffs' rights.'" Green Tree Acceptance, Inc., 108 N.M. at 174, 769 P.2d at 87 (action for conversion will sustain award of punitive damages) (quoting Loucks v. Albuquerque, 76 N.M. 735, 747, 418 P.2d 191, 199 (1966))". *Halwood.*

[39] *United States ex rel. Mackey v. Coxe*, 59 U.S. (18 How.) 100, 103 (1855) (holding that the Cherokee Nation was a "territory).

[40] *See,; Shepard v. Shepard*, 655 P. 2d 895 (Idaho 1982); *Jim v. CIT Financial Services, Corp.* , 533 P. 2d 751 (1975). The power of the United States to protect its lands and property does not admit of doubt. *See, Camfield* v. *United States*, 167 U.S. 518, 525-526 (1897); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404 (1917); *McKelvey* v. *United States*, 260 U.S. 353, 359 (1922); *United States* v. *Alford*, 1927 U.S. LEXIS 26,*4-6;274 U.S. 264; 47 S. Ct. 597;71 L. Ed. 1040 274 U.S. 264 (1927) (Indian lands are possessions of the United States and acts on private land that endanger Tribal land are prohibited, no state law to the contrary notwithstanding. *4-5).

See *Baez-Cruz* *v.* *Municipality of Comerio*, 140 F.3d 24, 28 n.1 (1st Cir. 1998)(Puerto Rico not specifically mentioned in §1738 is covered); *McCulloch* v. *Maryland*, 4 Wheat. 1819 U.S. LEXIS 320,* 20-21;17 U.S. 316; 4 L. Ed. 579;4 A.F.T.R. (P-H) 4491, (states as sovereigns did *not* have the authority to thwart States affirmative grants of authority to the Federal Government designs.) Indian Treaty law is exclusively federal (see, *Worcester, supra*) Utah's enabling Act of 1894, Section 3 second and Utah Code 9-9-208, 209.

[41] *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 173 (1973).

Atchison, T. & S.F. Ry. v. Sowers, 213 U.S. 55, 65 (1909); *Embry v. Palmer*, 107 U.S. 3, 9 (1883) (looking at the 1804 amendments to the original 1790 act finds the statute "must be taken to mean, such faith and credit as they are entitled to in the courts of the state, territory, or ***other country*** *subject to the jurisdiction of the United States from which they are taken.*"); *United States ex rel. Mackey v. Coxe*, 18 How. 100, 103 (1856) and *Standley v. Roberts*, 59 F. 836, 845 (CA8 1894), appeal dismissed, 17 S. Ct. 999, 41 L. Ed. 1177 (1896). [42]

Marchington also reasons that unless Congress has affirmatively *given* full faith and credit to Tribal orders, § 1738 can not apply. *6-8. [43] Contrarily, *Halwood* found no negative restraint for §1738[44]. See, *NLRB v. Pueblo of San Juan*, 2002 U.S. App. LEXIS

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[42] "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . . The intention of the legislature to repeal `must be clear and manifest." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). "In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government...". "*Morton v. Mancari*, 417 U.S. 535, 551 (1974).

[43] "A well-established canon of Indian law states that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). The Supreme Court has also explained that this canon means that "doubtful expressions of legislative intent must be resolved in favor of the Indians." *South Carolina v. Catawba Tribe of Indians*, 476 U.S. 498, 506 (1986). The canon applies to other statutes, even where they do not mention Indians at all. *EEOC v. Cherokee Nation*, 871 F.2d 937, 939 (10th Cir. 1989) (construing the Age Discrimination in Employment Act)." *NLRB v. Pueblo of San Juan*, 2002 U.S. App. LEXIS 587,*12 ;276 F.3d 1186; 169 L.R.R.M. 2129;145 Lab. Cas. (CCH) P11,225

[44] *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903). "(T)he intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Menominee tribe of Indians v. United States*, 391 U.S. 414 (1968); *Pigeon River Company v. The Cox Company*, 291 U.S. 138 (1934); *Squire v. Capoeman*, 351 U.S. 1, 100 L. Ed. 883, 76 S. Ct. 611 (1956).

587,*12 ;276 F.3d 1186; 169 L.R.R.M. 2129;145 Lab. Cas. (CCH) P11,225. *NLRB* provides a detailed dissertation on Statute and Treaty interpretation for Indian Tribes. *Id.* U. S. territorial and possession *plenary*[45] powers and the U. S. fiduciary duty to the Navajo, restricts or nearly mandates this Court interpret §1738 favorably for the Navajo, as in *Coxe*, given the restrictions on Article III judicial powers to restrict Treaty powers granted by Congress found in *Enas*, fn. 9, *supra*. Here, "Nothing can be plainer than that, if the law of Congress establishing"..the Navajo Treaty of 1849 and 1868 and enactments thereto[46] "be a constitutional act, it must have its *full and complete effects.*" *McCulloch*, *21 *supra.*

WHY FULL FAITH AND CREDIT IN FEDERAL COURTS SHOULD APPLY

This Court has cited to no Constitutional construction or statutory authority for a U. S. Article III court to avoid the United States fiduciary duty to its family of Indian Nation sovereigns by denying the Navajo Nation Court Orders full faith and credit. Full Faith and Credit will allow Tribal injunctions for emergencies and endangerment to life, to be rapidly carried out. Under current Supreme Court law, Petitioners seeking Navajo order enforcement face (1) counterbalancing facts for ever changing legal tests, (2) unmoored from 200 years of law and current statutes, (3) litigation in three areas of law, federal, state, and

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[45] *Atchison, T. & S.F. Ry. v. Sowers*, 213 U.S. 55, 65 (1909) [46]; *Embry v. Palmer*, 107 U.S. 3, 9 (1883); *United States ex rel. Mackey v. Coxe*, 18 How. 100 (1856) and *Standley v. Roberts*, 59 F. 836, 845 (CA8 1894), appeal dismissed, 17 S. Ct. 999, 41 L. Ed..1177 (1896);

[46] Protected by 25 U.S.C. §§ 450, 450, 1301, 1302, 1302, 3601, 3602, 3631, 3651, 3663, the BIA-Navajo Nation Judicial Program contract (EW P. L.); Treaty of 1868; and inherent sovereign power not attributable to Congress. *United States v. Wheeler*, 435 U.S. 313, 328 (1978).

Navajo, (4) in three levels of federal courts, after Navajo Court, (5) *against teams* of big law firms with limitless budgets (6) creating a procedural quagmire, or nightmare results, (also found in *National Farmers Union Ins. Co. et al v. Crow et al*, 1985 U.S. LEXIS 27,*;471 U.S. 845;105 S. Ct. 2447;85 L. Ed. 2d 818 (1985))...a direct violation of this Court's interpretation of §1738 in *Embry, Coxe, supra.* All Tribal rulings in conformity with limits of the statutes, as obligated by Treaty and BIA- judicial program contract, an official Executive agency action[47], are *ipso facto*, worthless in a non-Indian Utah Federal Court, as shown by this case. The law then becomes a cruel hoax for the Navajo Nation wherein they as a people have struggled mightily to overcome monolithic odds to become the modern democratic government it is today [48], handling about 90,000 cases annually. (EW P. Ap. 212a-232a), by fully cooperating with the United States Congress, Bureau of Indian Affairs and other agencies, with great National pride in the Navajo Nation, but also the United States, whom Mr. Riggs uncle died to preserve in World War II. (EW P. Ap. 21a).

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[47] "Normally, when the agency decision at issue involves interpretations of federal statutes, we owe deference to that decision as set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)." *New Mexico Cattle Growers et al v. United States Fish and Wildlife*, docket no. 00-2050 Tenth Circuit, May 11, 2001. 2001 U.S. App. LEXIS 8884,*7.

[48] *See, Eloise Pepion Cobell, et al. v.Bruce Babbitt, et al*;Civil Action No. 96-1285 ,Filed December 21, 1999 by Judge Royce C. Lamberth memorandum opinion, findings of fact and conclusions of law, http://www.dcd.uscourts.gov/96-1285i.pdf . Court describes oppression of Native Americans through the removal era, broken treaties, reservation era, allotment era, assimilation era efforts to eradicate Indian culture and take children from home for boarding schools and eradicate Native languages, 1934 reorganization act and attempts to rebuild Native communities, the 1950's termination policy, and finally the growth of Tribal self-determination. *Id.* at pages 7 –12.

Treaties entered into by the President and the Senate as mandated by Article II, Section 2, Clause 2, are considered to be "the supreme law of the land," as such, "**judges in every state shall be bond thereby**." *Missouri, infra.* Emphasis Added. Also, Article IV Sec. 3 (Property Clause). "The *Congress shall* have power to dispose of and make *all* needful rules and regulations respecting the *territory* or *other property* belonging to the United States;...." *Missouri v. Holland*, 252 U.S. 416, 434 (1920). 25 U.S.C §3601 et seq. Even also to counties.[49] When "state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, state courts are generally divested of jurisdiction as a matter of federal law." *Iowa Mutual Insurance Company v. La Plante*, 480 U.S. 9, 15 (1987)." *Bank One N. A. v. Shumate*, 2002 U.S. App. LEXIS 2412 *8-9. In 2002, after *Hicks*, the 10th and 5th Circuits held, "Because the Tribe retains *all* inherent attributes of sovereignty that have not been divested by the Federal government, the proper inference from silence ... is that the sovereign power ... remains intact." Id. , *NLRB* 14, *Bank One*, *9 *supra.* See, fn. 30. Emphasis added.

WHY IMMEDIATE RELIEF IS NOT AVAILABLE IN ANY OTHER COURT

The Federal District Court (EW P. Ap. 195a,197a, 210a,) and Tenth Circuit Court of Appeals (EW P. Ap. 119a, 135a, 136a) have already denied relief of these orders and full faith and credit. The Tenth Circuit Court has denied a petition for a writ of mandamus (EW P. Ap.119a, EW P. L.226-263) to recuse

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[49] "A treaty, as the law of the land, is superior to any State legislation, and is valid even as a municipal regulation, until superseded by some act of Congress. Ware v. Hylton, 3 Dall. 236; Taylor v. Morton, 2 Curtis, C. C. 454: 1 Story on Const., sect. 1838; " *U. S. v. Forty-Three Gallons of Whiskey*, 98 U.S. 188, 1876. *See, MacArthur at (EW P. Ap.)*

the Federal Court judge and to enforce these Orders under full faith and credit, and a motion for reconsideration. EW P. Ap. 241a. The Petitioners' motion for full faith and credit, currently on remand in the Federal district court, has not been ruled upon for months. Petitioners assert the lower District Court has made a statement of predisposition indicating the orders would be appealed again.

In this case there are Navajo and non-Navajo plaintiffs. [50] Prior to the Judge studying the Navajo orders, (EW P. Ap. 94a), the Judge denied a request for a Rule 54B order (for non-Navajo plaintiffs' dismissal), and stated "Well I think the easy way here is for us to finish up the work that we need to finish up on the other matter [Navajo remand] and then let it all go if it's going to go. That won't take long." EW P. Ap. 99a. and failed to remember such a statement later. (EW P. Ap. 116a). [51] Petitioners assert that the Federal Court's comments about re-appealing the enforcement orders before he studied them, at least are likely *to appear* to be less

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[50] There are hundreds of stipulated contested facts, in regard to non-Navajo Court state and federal law plaintiffs, Lyman, MacArthur, and Valdez, along with other plaintiffs previously dismissed, who brought state and federal claims, at the same time the Navajo Court petitioners Riggs, Singer and Dickson sought their Navajo Order enforcement. (EW P. L. 131-226). Even so the District Court summarily orally dismissed these three parties, made findings of contested facts, without a reference to a source of a law, (EW P. AP. 93a- 97a) prior to addressing the evidence and witness parts of the pretrial order in a hearing, and without allowing any amending of the Complaint (EW P. Ap. 100a) to cure any possible defects.

[51] Also, the Federal Court Judge has not ordered the respondents to brief *Nat'l Farmers*, as the Tenth Circuit Court mandated, and as the Petitioners have done. *MacArthur* (EW P. Ap. 141a). A *Nat'l Farmer's* analysis produces results of presumption of tribal authority over non-Indians exactly opposite of *Montana*'s, and without briefing, perhaps a decade of litigation bouncing between appellate courts.

than impartial to an objective third party. 28 U.S.C. § 455, "The goal of section 455(a) is to avoid even the appearance of partiality" *Lilyeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 871 (1988).

To condemn these Navajo plaintiffs to eternal appellate courts, as occurred for equal schools in San Juan County, Utah, [52], 25 years of litigation of San Juan defendants fighting their own consent decree, denies the Navajo plaintiffs of the Federal Rules of Civil Procedure at Rule 1 entitlement of due process of a speedy and just resolution of their claims. Justice O'Connor's *Hicks* prophecy of people acting with impunity on reservations is here in this case. Hicks, *34. Tribes are superior to States in their inherent authority. *NLRB, supra.* Respondents have waived their Navajo Court relief[53] and full faith and credit is appropriate to allow the Navajo Nation to protect itself. Full faith and credit is appropriate to allow the Navajo Nation to protect

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[52] *Sinajini v. Bd. of Ed. of San Juan County Sch. Dist.*, 47 F. Supp. 2d 1316, 1318 (D. Utah 1999). *Sinajini v. Bd. of Ed. of San Juan County Sch. Dist.*, 964 F. Supp. 319, 321 (D. Utah 1997). *Sinajini v. Bd., of Ed. of San Juan County Sch. Dist.*, 233 F.3d 1236, 1240 (10th Cir. 2000). See also, several year fight to obtain representation of Native Americans on San Juan County Utah State Court juries, where they are 54% of the population. *Crank v. Utah Judicial Council*, . 2001 Utah LEXIS 12,*;2001 UT 8; 20 P.3d 307;414 Utah Adv. Rep. 14. These are valid reasons why these Navajo Petitioners sought legal protection in their own Navajo Courts, for Navajo law claims.

[53] The Navajo Courts are of record. (EW P. Ap. 88). Respondents could have certified questions to the Navajo Supreme Court and/or sought of Writ of mandamus or prohibition from the Navajo Supreme Court (EW P. Ap. 91, 7N.N.C.§ 303), sought in Federal Court relief at all points of litigation (*Nat'l Farmers*), filed a judicial misconduct complaint if one was warranted (EW P. Ap. 92, 7N.N.C § 352)called for more hearings, sought settlement, and, wholly failed to do so. Truck was dismissed, but was eligible for being renamed and reserved and the federal and Tenth circuit dismissed him by finding a lack of contract with an Indian or Indian tribe. EW P. Ap. 132a.

respondents counterclaims (EW P.L. 288 et al) *equally* with Petitioners, carry out the terms of its contract, and fully contribute as a U.S. sovereign, to the marketplace of ideas, along with Puerto Rico, the Marianas, and states to the benefit of all.

CONCLUSION

For all the foregoing reasons, this Petition for an Extraordinary Writ of Mandamus should be granted and these United States federally statutorily-, Constitutionally-, Treaty-protected Navajo Nation Court orders enforced against the Respondents, with Respondents fully mandated to obey them, under 28 U.S.C. §1738, or comity. Petitioners pray for this Court to mandate respondents to pay for all litigation costs and fees associated with enforcing these Navajo orders in all Federal Courts.

ISSUE 2: The Respondents' 'unified defense' so contradicts rules of ethical representation that the Petitioners are denied due process and the Respondents' should be prohibited from using the 'unified defense' in Federal Courts by an extraordinary writ of prohibition by this Court.

WHY THIS PETITION SHOULD BE GRANTED

In this case, the District and County, as constituent organizations, have not had counsel separate from all other respondents. [54] Federal Rules of

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[54] In Utah, officers and employees are separate from the government organizations. See, *Salt Lake District v. Short*, 1999 UT 73, docket no. 980074 at No. ¶ 34 ("In conclusion, we find that the District Attorney only has an attorney-client relationship with the District, and not with the Commission and its individual Commissioners.") *Ex Parte Young*, 1908 U.S. LEXIS 1726,*66-67; 209 U.S. 123; 28 S. Ct.

Civil Procedure 16 allows the Courts and parties to facilitate settlements, expedite litigation, shorten discovery, facilitate solutions at the lowest government level directly, promotes judicial economy, facilitates government investigation and candor to the tribunal. Rules of Professional Conduct at Rule 1.13 (investigation and prosecution of officials). Opposite rule 1.13, in a unified defense, the wrongdoing officials can thwart any organizational investigations and prosecution of officials.[55] Candor to the tribunal under Rule 3.3 and to opposing counsel under 3.4 are appreciably impaired. In Utah, Petitioners are supposed to have full and free access to the government party as their right of petitioning the government for redress of their grievances and free speech, under Article 1 of the U.S. Constitution. Utah Bar Ethics Opinion 115, 115r, *infra*. http://www.utahbar.org/opinions/html/115r.html Not when the organization has no independent counsel. Navajo and Federal Rule 16 as to settlements, that tremendously expedite litigation, save judicial resources, facilitate mutual understandings, etc. are unavailable as to Petitioners and organizations, and the Court alike.

The Insurance company appears to totally control litigation, and thus this County's fisc. The Insurance Company threatens that respondents may have to pay the insurance company's expended legal fees for respondents if the officials are found to be liable for injuries not covered in the reservation of rights

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441;52 L. Ed. 714 (granting injunctions appropriate even against State officials).

[55] "We also conclude, however, that the generally applicable conflicts rules of the Rules of Professional Conduct apply to each district attorney and deputy district attorney on an attorney-by-attorney basis. These rules include Rule 1.7 (Conflict of Interest: General Rule), Rule 1.8 (Conflict of Interest: Prohibited Transactions), Rule 1.9 (Conflict of Interest: Former Client); and Rule 1.13 (Organization as a Client). " Utah Ethics Opinion 98-06.

letters. (EW P. L. 15, 23)— a good reason why the new Commissioners, unsure of their authorities in office, may be doing nothing to rectify the situation, unless ordered to do so by a Court. (EW P. Ap. 148a-150a). It is Petitioners information that since at least January 1, 2003, the two very new Commissioners Morgan and Stevens, (a majority) have signed no consents for Suitter & Axeland or Mr. Trentadue to represent the County or them officially nor been contacted by Mr. Trentadue or his firm. (EW P. Ap. 149a). Plaintiffs' counsel has found no County Commission meeting minutes showing discussions of litigation since January 1, 2003.

The Utah Bar Association states, "Further, the government has a "duty to advance the public's interest in achieving justice, an ultimate obligation *that outweighs its narrower interest in prevailing in a lawsuit.*" Citing *Frey v. Dept. of Health & Human Services*, 106 F.R.D. 32, 37 (E.D.N.Y. 1985). Utah Bar Ethics opinion 115. http://www.utahbar.org/opinions/html/115.html. Also involved are conflicts with Rules 1.3 (diligence); 1.4 (keeping the client informed); 1.6 (privacy of communications); 1.9 (former client conflicts). "A district attorney or deputy district attorney who cannot individually satisfy the requirements of these rules should not engage in, supervise, direct, *or have access to confidential information* pertaining to the representation in question." Utah Bar Ethics opinion 98-06. http://www.utahbar.org/opinions/html/98-6.html . Likewise for private attorneys [56]. In Federal Courts, this unified defense should be strictly prohibited. It has

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[56] The comment from Rule 1.13 of the Utah Rules of Professional Conduct states "[a] lawyer for the government may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution." Utah Rules of Professional Conduct Rule 1.13 cmt. (1999).

denied the Petitioners due process, at *great* cost, and the Federal Courts' judicial economy.

WHY IMMEDIATE RELIEF IS NOT AVAILABLE IN ANY OTHER COURT

This issue was raised in federal court *at least* twice and summarily disregarded as this representation problem was respondents' problem, not the plaintiffs. Without the County having independent counsel, it is the Petitioners' and Courts' also. There is a stay on proceedings in the Navajo Court. The Tenth Circuit has rejected the Petition for mandamus and full faith enforcement. (EW P. L. 226-263, EW P. Ap 119-120).

CONCLUSION

Based upon the foregoing, an Extraordinary Writ of Prohibition should issue against the respondents, prohibiting them from using the 'unified defense' in federal courts, and ordering the County and District to obtain new and wholly separate counsel. Petitioners pray for the Court to Order the Respondents to pay all fees and costs associated with this Navajo Order enforcement action throughout the Federal Courts. It has denied the Petitioners their due process and judicial economy in Federal Courts.

Respectfully Submitted,

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EW 1a

(Any footnotes trail the end of each document.)
SR-CV-162-99-CV

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK,
NEW MEXICO

DONNA SINGER; Fred Riggs C#18570;
Alison Dickson C#212,765;
Plaintiffs,

v.

SAN JUAN COUNTY; San Juan Health
Service District; Rick Bailey; Reid Wood;
Lauren Schafer; Craig Halls;
Commissioner Bill Redd; Roger Atcitty;
Commissioner Mark Maryboy; John Lewis;
Commissioner J. Tyron Lewis; Karen
Adams; Patsy Shumway, and other John
and Jane Does as yet unnamed in their
personal and official capabilities.
Defendants.

FINDINGS, OPINION AND JUDGMENT AT
PRELIMINARY INJUNCTION

THE COURT, having jurisdiction over these parties and proceedings made out on a territorial premise, that is, the area in which the subject health care facility is located is within the territorial jurisdiction of the Navajo Nation, and for further cause that two of the three plaintiffs are members of the Navajo Tribe of Indians, the third is married to enrolled member, and they ALL have significant contact with the Navajo Nation, as does the clinic itself as a major health care provider to the Navajo and other local Native Americans who look to

this Court for justice. Such contentions of jurisdiction are well founded by way of Montana v. United States, 450 U.S. 544 (1981) and the exception found in Strate, Associate Tribal Judge, Tribal Court of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, et al, v. A-1 Contractors, U. S. Supreme Court, April 23, 1997, notwithstanding 7 NNC 253(B), and therefore, having now before it the above styled proceedings ripe for decision in the matter of the application of the plaintiffs for a preliminary injunction pursuant to Rule 65(c) of the Navajo Nation Rules of Civil Procedures, pending trial in chief in the matter of the initial complaint drawn by the plaintiffs against the defendants raising issues of:

denial of due process;

denial of equal protection;

denial of free speech and assembly;

defamation;

theft;

conspiracy;

and interference with the public policies of the Navajo Nation.

Despite the contentions of the defendants, the Court specifically finds all these claims raise issues clearly extending well beyond the mere loss of income or loss of a job, directly into the wellbeing of the plaintiffs and Navajo Nation citizens and as argued by the plaintiffs, go to the soul of a person and their inalienable rights that exceeds monetary value.

Likewise the plaintiffs also raise claims that the Native American, and in particular, Navajo patients of Montezuma Creek Clinic, have likewise been and are being harmed by the San Juan Health Services District conduct, by way of:

stopping emergency and routine ambulance and EMT service;

stopping laboratory services; and

billing of INS patients creating the chilling result of effectively turning many patients, including diabetic patients, away from the Montezuma Creek Clinic for fear of their inability to pay for their care.

For raising such claims, the plaintiffs, as well as plaintiffs counsels, were labeled 'bold faced liars' by the defendants and likewise, San Juan Health Services District has totally disregarded the Navajo Nation's chapters' resolutions and the concerns for the Navajo patients' well being.

On initial application the Court issued a temporary restraining order on behalf of the plaintiffs in prelude to the proceedings in chief on injunctive relief. The TRO was dismissed on the motion of the defendants and the proceedings on the preliminary injunction commenced thereafter on testimony. Testimony was taken in sequential setting with written closing arguments received by the court on the 6th of December, 1999.

With the plaintiffs represented by Wm. P. Battles, Esq. of the firm of Wm. P. Battles and Associates of Window Rock, Navajo Nation, and Susan Schildmeyer, Esq., and the defendants by Dennis Ickes, Esq., all testimony and arguments are now fully before the Court, and well

considered in their total, the Court draws attention to the issues of injunctive relief as found at Rule 65(c) of the Rules of Civil Procedure, stating:

That the moving parties, the plaintiffs herein, must demonstrate to the Court that they have a claim framed in a protectable right or interest and have a high likelihood of success on the merits; and,

That the plaintiffs then must further demonstrate that they are likely to suffer irreparable injury, loss, or damage to that protectable right or interest unless injunctive relief is issued; and,

That the likely injury, loss, or damage to the plaintiffs are substantial in nature and character; and finally,

That the plaintiffs do not have an otherwise available and adequate remedy at law.

The Court is mindful that the issuance of injunctive relief is clearly within the sound discretion of the trial court. Kenai Oil & Gas, Inc. v. Department of Interior, 671 F.2d 858, 866 (10th Cir. 1982).

Accordingly, the Court makes the following findings based on the testimony before it:

That as to the matter of plaintiff Fred Riggs:

That Mr. Riggs is a Physicians Assistant and a permanent regular employee of the San Juan Health Services District at the Montezuma Creek Clinic; and, on or about the 11th day of November, 1998, Mr. Riggs was RIF and rehired with a $10,000.00 pay cut; was made to start using a time card; and lost three years of raises,

including his raise for being a Navajo-English interpreter; and,

That the RIF was not done in compliance with the Navajo Preference in Employment Act (NPEA) in as much as there was no written justification as to just cause for the RIF; nor was a warning of the RIF made to Mr. Riggs; nor was Mr. Riggs RIF last, as a Navajo Physician Assistant; and, Prior to November of 1998 Mr. Riggs had 30 years of unblemished employment as a Physicians Assistant, and had not prior to November 1998 ever been required to have hourly time keeping responsibilities; and,

That in the second week of November, 1998, or thereabouts, on Mr. Riggs first ever time card, Mr. Riggs accidentally represented 8.4 hours as a day and a half or 12 hours; and, That as a result of this time card mistake Mr. Riggs was disciplined from the 2nd day of December, 1998 to the 8th day of December 1998 by:

Being placed on administrative leave, and being told that he could not speak or associate with other clinic employees; and, being charged with fraud, in writing, and the same being placed in his personnel file as a disciplinary measure; and,

Being placed on probation for the term of 30 days, creating fear from the loss of his employment; and, given further warnings that he may be terminated for repeating such time card errors; and,

That Mr. Riggs never received any warning letters; any time card instruction; nor any time to correct any alleged deficiencies, either prior to this November RIF, or the aforestated discipline or probation; and,

That within less than 10 (ten) days of being charged with fraud and being placed on administrative leave, and subsequently probation, Mr. Riggs was offered a promotion to fill the position made vacant by Ms. Singers termination, as manager of the Montezuma Creek Clinic; and,

That Mr. Riggs grieved his discipline as being discriminatory in a letter to Mr. Wood, and Mr. Wood nearly immediately withdrew the offered promotion because Mr. Riggs had accused him of discrimination; and,

That the personnel policies and procedure of the San Juan Health Services District prohibit punishment of employees who make discrimination grievances such as Mr. Riggs had done; and,

That Mr. Riggs has specialized medical training and has not been on hourly time card keeping requirements in the 30 years or so prior to November of 1998, and that as a bona fide professional, is exempt from time card keeping requirements; and,

That Mr. Reid Wood stated that time cards were a problem throughout the San Juan Health Service Districts payroll activities and had to be stopped; and,

That after Mr. Riggs grievance hearing he was placed on an additional 30 days probation without justification; and,

That Rick Bailey found Reid Wood had falsely informed Bailey of the breadth of discipline meted out to Riggs, and Wood was never disciplined for telling his superior a falsehood; and,

That the spread sheet analysis of Bryan Bolander, and the time cards submitted to the Court show similar and multiple errors on the time cards throughout the San Juan Health Services District; and,

That particular time cards showed, for example, that even in the first week of November, 1998, just one week prior to Mr. Riggs being disciplined, Reid Woods time card had ink; cross outs; and write ins, errors for Which others, notably the plaintiffs, were disciplined, however Reid Woods was not similarly disciplined for his time cards errors; and,

That a second example is the time cards of Bruce Bryant a caucasian physician assistant, had time cards showing he was not required to punch in or out, either before or after the November, 1998, RIF; and,

That a third noted example are the time cards of Mary Nielson, again showing ink; cross outs; and white outs, while Mr. Riggs and Ms. Singer were being severely disciplined for like infractions, no discipline was taken in respect to Ms. Nielson; and,

The defendants offered absolutely no credible evidence of the San Juan Health Services District affording any evidence of Mr. Riggs receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to his employment; no evidence of any consideration of the Navajo Preference in Employment Act in its actions towards Mr. Riggs; and no evidence that the San Juan Health Services District had not intentionally used the reputation of Mr. Riggs without his permission essentially to stop the time card problems throughout the San Juan Health Services District and,

The defendants did not offer any evidence that the defendants had not administratively conspired to continue to use Mr. Riggs reputation and case as a means of arbitrarily; capriciously, and abusively making an example of what happens to people who take grievance of decisions of the San Juan Health Services District, and who make allegations of racial or other discrimination; and,

Testimony of Ms. Singer:

Ms. Singer was a permanent employee and manager of the Montezuma Creek Clinic; and,

Mrs. Singer had previously helped set up and manage the Blanding Urgent Care Center, and the Blanding Birthing Center; and,

That Ms. Singers career started as an x-ray technician working up to being the manager of three different health care clinics; and, that for some of Ms. Singers career as a clinic manager she did not have to punch in and out on time cards; and,

That the San Juan Health Services District recognized managers as FSLA exempt as a matter of policy; and, Ms. Singer had three job assignments with the San Juan Health Services District ü(1) as an x-ray technician; (2) an Ultrasound technician; and (3) the Manager of the Montezuma Creek Clinic; and,

That Ms. Singer worked approximately 3000 hours off the clock without being paid overtime; and,

That Ms. Singer had a great deal of latitude in making management decisions since Montezuma Creek Clinic was so far from the Monticello, Utah, headquarters of

the San Juan Health Services District and the District administrators seldom visited the Montezuma Creek Clinic; and,

That on the 13th day of November, 1998, Ms. Singer was unaware of another persons clocking in on her Montezuma Creek Clinic time card when she was in Blanding; Utah; and,

That Ms. Singer told the Chief Financial Officer of her whereabouts on the date in question and,

That the purported time card error involved only four hours of work for which Ms. Singer was never paid, and Ms. Singer admitted to having made the time card error; and,

That Ms. Singer was charged with fraud; placed on administrative leave; told not to communicate with anyone at the clinic; and then terminated; and,

That Ms. Singer was not previously aware that Rick Bailey was the instigator of her termination until she received the Answer of the 14th of May, 1999, and suspected from the information therein provided that Mr. Bailey had authorized her termination; and,

That Rick Bailey testified that he felt uncomfortable being Ms. Singers grievance hearing officer because he had actually participated in the decision to terminate Ms. Singer, and he testified further that he relied on Craig Halls' advice to proceed as her grievance hearing officer anyway in spite of Utah Supreme Court law to the contrary and further Mr. Bailey and Mr. Wood concealed this information from Ms. Singer, and,

That Ms. Singers future in public health and in her small community where she resides has been harmed due to the adverse publicity of the malicious and unfounded fraud charges against her, Monument Valley Clinic, also within the San Juan Health Services District, was not obliged to punch in and out on time cards; and,

That Mr. Bolander testified that as per his spread sheet analysis the number and types of errors commonly found by him to exist in the San Juan Health Services District that if everyone time cards were multiplied by three places of work and had to have documented time they would probably all look the same as Ms. Singer and Beverly Harris cards; and,

That as per Mr. Bolander's testimony, Beverly Harris time cards are worse than Singers and Ms. Harris was never disciplined; charged with fraud; or terminated; and,

That according to the further testimony of Ora Lee Black, caucasian, she testified that she had herself personally called into work to have someone clock in for her on numerous times, so numerous that Ms. Black when questioned could not recall how many times, and that to Ms. Black further knowledge that other nurses in Blanding, Utah, did likewise as a common practice, without being disciplined; charged with fraud; or terminated; and,

The defendants offered absolutely no credible no evidence of the San Juan Health Services District affording any evidence of Ms. Singer receiving any due process; evidence of any degree of equal protection of the policies and procedures, as well as the law, applicable to her employment no evidence of any consideration of the Navajo Preference in Employment

Act in its actions towards Ms. Singer; and no evidence that the San Juan Health Services District had not intentionally used the reputation of Ms. Singer without her permission essentially to stop the time card problems throughout the San Juan Health Services District nor did the defendants offer any evidence that the defendants had not administratively conspired to continue to use Ms. Singers reputation and case as a means of arbitrarily; capriciously, and abusively making an example, even as to trial by the media of what happens to people who stand up for their rights and take grievance of decisions of the San Juan Health Services District, and who make allegations of racial or other discrimination; and take any position in opposition to the San Juan Health Services District or the defendants themselves; and,

That as to the matter of Allison Dickson status of employment:

That Mr. Dickson started working for the San Juan Health Services District as a full time temporary fill-in in March of 1998 and in November of 1998 applied for full time employment status; and,

That Mr. Dickson time cards and W-2 show that Mr. Dickson worked some 700 hours after his temporary fill-in position had expired; and,

That the policies and procedures of the San Juan Health Services District states that after an employee has worked for the total of 520 hours they will be made to be regular employees of the San Juan Health Services; and,

That the defendants acknowledge that Mr. Dickson formally requested in writing to Mary Nielson on the 11th

day of December, 1998, that he be given regular employment status; and, That Mr. Dickson signed an affidavit attesting to the highly racially inflammatory and insensitive comment of Reid Wood concerning Certificates of Degree of Indian Blood being equated with "dog tags"; and,

That the time cards entered into evidence demonstrates the current Montezuma Creek Clinic manager's nephew is working full time as a regular status employee and working for more hours than Mr. Dickson with less time in seniority; and,

That finally, the records of the San Juan Health Services District show that there is no other employee of the San Juan Health Services District with Mr. Dickson's time in service measure by regular work hours that is not a regular permanent employee with benefits of regular status employment.

Defendants' Evidence is completely Admitted

Commensurate with Navajo Nation Customs and Traditions that highly value fairness and everyone having their say, the Court allowed into the record all of the defendants' exhibits as follows:

All of Ms. Singer's time cards and payroll records, and the time cards of all other persons in the employ of the San Juan Health Services District, and a spreadsheet drafted by CPA Bolander explaining the patterns of mistakes and errors were admitted on behalf of the defendants.

a. The time cards show that errors were rampant throughout the San Juan Health Services District system

and were not at all limited to just the time cards of the plaintiffs Mr. Riggs and Ms. Singer; and,

That three of the time cards of Ms. Singer were never given to either Singer at the time of her termination, nor used in any evaluation of Ms. Singers termination, nor provided to the counsels for the plaintiff despite appropriate discovery being timely requested; and,

b. That on the hearing of the 14th day of May, 1999, Mr. Bolander testified that the three time cards shown to him were not part of the cards he was previously provided with to examine either by the San Juan Health Services District or provided to plaintiffs counsels; and

A letter from Lauren Shafer critical of Ms. Singer was likewise accepted, and notably had a "check mark" in the upper right corner signifying it was not kept in Singer's ordinary personnel file, but a secret file in the CEO's office.

a. Lauren Schafer, a chief administrator with the San Juan Health Services District never rebutted in her testimony where the letter was kept; and,

b. That despite the inflammatory nature of the letter it was never placed in Ms. Singer's appropriate personnel file, nor did the prior Chief Executive Officer apparently consider the letter when Ms. Singer was given regular merit pay raises and additional duties and expanding management responsibilities; and,

c. The Court accordingly views the letter with substantial lack of importance; and, That Lauren Schafer testified that after a "scrupulous examination" of Singer's record for over nine months, Ms. Schafer had

not discovered one piece of evidence as to Ms. Singer's intent to commit fraud.

Ms. Singer testified that she never remembered doing anything to intentionally cheat the San Juan Health Services District or San Juan County out of anything; nor does any evidence presented otherwise indicate anything to the contrary; and,

Ms. Singer testified that she never remembered ever calling anyone to clock in for her on any occasion; nor does any credible evidence presented otherwise indicate anything to the contrary; and,

Contrary to the assertions of the defendants, Mr. Bolander testified that Ms. Singer's cards show that:

Ms. Singer documented where she was at on a consistent basis; and,

That Mr. Bolander could find no evidence whatsoever of fraud; and,

That Mr. Bolander's spreadsheet analysis, along with a multitude of time cards in comparison, illustrated plainly that time card errors were and are a problem in the district, and not at all limited to only Mr. Riggs and Ms. Singer; and,

That the defendants have all failed to submit even one piece of evidence rebutting the expert testimony of Mr. Bolander, or his analysis, or his well-reasoned and documented findings which rely exclusively on the evidence which was in the possession of the defendants and tendered by the defendants to the Court as discussed in the foregoing.

LEGAL CONCLUSIONS AND FINDINGS

At first glance, and without the benefit of testimony, these proceedings appeared to have been framed solely as a labor-employment issue. Closer examination and scrutiny of the testimony before the Court it is not nearly so simply the case herein, especially in light of the sworn testimony. Discrimination never is obvious or simple. It is most commonly found in subtle subterfuge manifesting deceit and contempt for the human condition to which each of us are differently born, and for which, without the benefit of those strong enough to come forward through the feigned veil of petty righteousness and resulting humiliation, it can only be endured in the silent pain of accepting disgrace and indifference. It is always a sad sad moment in the condition of mankind. No exception is found here.

With minor adaptation from the arguments delivered to the Court, the Court has largely adopted the position of the plaintiffs to the legal reasoning of these proceedings. Wherein the premise of the case before the Court is multi-faceted - framed in the original complaint, and now seeking parallel injunctive relief. Rule 65 of the Navajo Rules of Civil Procedure provides for the preservation and consequence of evidence and testimony, and further sets forth the legal basis for an injunction which lays in Navajo case law, and focuses to proving four criteria for an injunction.

Case Law

The case law of the Navajo Nation provides that an injunction is extraordinary relief that is granted when an injury is unquantifiable and when there is no adequate remedy at law. Gudac v. Marianto, 1 Nav. R. 385, Nav. App. Feb. 28, 1978. The United States Supreme Court

has likewise found that while economic loss alone generally does not constitute irreparable injury, "cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may be so far departed from the normal situation that irreparable injury might be found." Sampson v. Murray, 415 U.S. 61, 92 n. 68 (1974). Notably, and contrary to the contentions of the defendants, the factual circumstances of Sampson are well seen to be nearly wholly unlike the facts circumstances here, but as so stated. Here, now having taken evidence and testimony, and on the examination of the Court, we have instead permanent employees or employees who qualify for regular employee status. Sampson involved a temporary employee with no vested interest in her employment. Sampson also had the availability of a completely impartial hearing panel. Here, it is noted from the testimony that such an impartial hearing panel was tainted in bias and deceit. The plaintiffs did not have the availability of such an impartial panel. Further, and unlike Sampson that concerned only employee matters, these plaintiffs produced testimonial evidence and documentary evidence to support their claims of violation of civil and personal rights which are protected by the Navajo Nation Bill of Rights, notwithstanding the 1968 Indian Civil Rights Act, and as well the San Juan Health Services District's endangerment of the Native American and Navajo public that SJHSD did commercially and voluntarily within their corporate powers contract to provide services to.

As in the case of Halona v. Navajo Nation, 1 Nav. R. 189, the key to this case lies "not in non-Indian analysis." as to any matter of standing. Id. at 199. The fact that makes this case most distinguishable from Sampson in terms of the need for protection of the plaintiffs, is that the plaintiffs have a privilege and a duty under Navajo

custom and tradition for Mrs. Singer in her tribal in-law status and Mr. Riggs and Mr. Dickson in their enrolled status, to look out for the welfare of their fellow Navajo "citizen". In Halona, this Tribal status raises issues "peculiar to Navajo tradition and law." The Navajo clan system, applicable to in-laws through their spouses, demonstrates the unique bonding of Navajo's to other Tribal members or non-tribal members as family, and the familial duties inherent to care for other members of the Tribal family as demonstrated by the plaintiffs in this case and by the common nature of Navajo custom and tradition, and not dissimilar from the familial duties as found among other tribes that remain likewise in their nearest to original condition in respect to their customs and traditions.

Further, and while not controlling it is at least instructive, that the Tenth Circuit has established the following four criteria for a preliminary injunction, not dissimilar to the requirements at Navajo law:

The movant must establish that the injunction would not be adverse to public interest; and,

That the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and,

That the movant will suffer irreparable injury unless the injunction issues; and,

That there is a substantial likelihood that the movant will eventually prevail.

Accordingly:

The Preliminary injunction will not

Be Adverse to the Public Interest

In this case, a preliminary injunction will insure the protection of overwhelming public interest by way of the restoration and preservation of patients' welfare in the northeastern sector of the Navajo Nation; restoration of the clinic operations of the Montezuma Creek Clinic that are sensitive to Navajo needs; customs; and economic levels; and eliminating nepotism and favoritism in employment; thereby improving adherence to the provisions, terms, and conditions of the Navajo Preference in Employment Act and reducing the chilling effect on the people's rights as is so well evidenced here. The injunction will further support and sustain the local Chapters resolutions.

Patient Welfare

On November 9, 1999, the Court was given a letter from Nettie Pratt, the Montezuma Creek Clinic's diabetic clinician, indicating that there had been as much as a 250% drop in visits by diabetic patients alone to the Montezuma Creek Clinic, and many of those patients have now not been seen for three months or more. The reason these patients have not been coming in for life critical medical care is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention. Even one more month without effective management and adhering to compliance in stopping the billing, may lead to death, or serious irreversible eye or kidney damage to the patients, or other complications for the diabetic patients. Likewise in a similar vein, Debbie Benally, an Emergency Medical Technician for the Montezuma Creek Clinic, testified that when the ambulances were "locked down", Mrs. Singer, and plaintiffs attorneys,

were the only one who cared, who called, and who tried to get something done about it despite the sneers and jeers of the defendants.

Smooth Clinic Operations

Brenda Brown, the current manager of the Montezuma Creek Clinic testified on September 24, 1999, that on numerous occasions the administration has refused to give even her the financial reports for the clinic that would have enabled her to do her job or otherwise effectively assist in the appropriate day to day management and operation of the Montezuma Creek Clinic especially in light of the now upcoming transition to local tribal control.

Limiting Nepotism

Nepotism, likewise contrary to the personnel policies and procedures of the San Juan Health Services District as per the testimony received, is rampant at Montezuma Creek Clinic in that, for example, the manager is the sister of the Chairman of the Board, and likewise San Juan Health Services District, also by testimony, employs the current managers aunt, cousin, and nephew all working at the same clinic despite policy otherwise.

NPEA Adherence

Testimony likewise reflected that employment positions throughout the San Juan Health Services District have not been advertised either "in house" to existing San Juan Health Services District employees or in the Navajo Times or KTNN Radio as required by the Navajo Preference in Employment Act. As a matter of the public policy of the Navajo Nation labor is regulated to a certain extent including the provisions of the Navajo

Preference in Employment Act - which compels a competitive process for employment which does not exclude Navajos, and other particular persons, and creates a qualified preference pool of Navajo labor whenever possible û in that economic development and employment of the surplus Navajo work force are of significant public interest to the Navajo Nation and applicable whenever possible.

Little or No Damage to The Opposing Party

The defendants have confessed at the hearing of these proceedings on the 9th of November, 1999, that the Montezuma Creek Clinic will be removed from the control and supervision of the San Juan Health Services District beginning the 1st day of January, 2000, in part at least due to the impact of this litigation. The defendants therefore argue that if the injunction issues now; it will only have effect for one month. The plaintiffs offer that even if for only a short time, that time is still crucial to the clinic's existence.

The defendants can not complain of damage due to large sums of back pay if the defendants could have cut the time very short by telling the truth on May 14, 1999. "Justice delayed is injustice" and "(N)o party can claim prejudice if the ability to prepare or raise claims was within his or her control, as here." Plummer v. Plummer, A-CV-30-89 at page 182.

Plaintiffs will Suffer Irreparable Injury if the Injunction Does Not Issue

If the injunction does not issue, people will consider the charges and actions against the plaintiffs to be true, and they will continue to suffer the irreparable harm to their names and reputations as attested to by the testimony of

Pauline Oshley, George Jones and Debby Benally. These witnesses testified as to the harm to the Clinic, and to the plaintiffs, in specificity; (a) stoppage of ambulance services; (b) interference with pharmaceutical services; (c) stoppage of lab services; (d) harm to the reputations of Mr. Riggs and Ms. Singer, (e) and violations of rights of association of the plaintiffs.

There will be a chilling effect upon the rights of all Navajo citizens in the work place if they do not believe there can be redress against their employers for rights violations in the workplace. San Juan County Commissioner Mark Maryboy testified that San Juan County has a deliberate pattern of not treating the Navajo people equally; violating the rights of Navajo and other Native American employees, and retaliation and discrimination against Navajo and other Native Americans that has continued for generations.

The harm has been irreparable. Ms. Singer testified that the scarcity of her personal resources, and the length of time the defendants have stalled these proceedings by obstructive tactics and false statements to the Court, has necessitated her to become separated from her husband in order for the family to financially survive. One can not quantify and compensate for the total disruption of a marriage and home done simply at the folly of her oppressors.

Mr. Riggs attested that his uncle, a veteran of the United States Armed Forces, died for these rights and freedoms for all Americans, and that can never be adequately compensated for by money or by the law. How does the Court or defendants compensate for the loss of rights bought with Navajo blood? It can't. Still, an injunction will begin the process of healing and the removal of the

indignation of the phony fraud charge that still maliciously clouds Mr. Riggs' and Ms. Singer's name.

Pauline Oshley testified as to the "shabby" treatment the manager's family has been giving to her, and her small children. How is a young Brenda Brown, as Montezuma Creek Clinic manager, supposed to give orders or reprimands to her elder Aunt, Dorothy Kay, and stay in keeping with Navajo tradition and the family interrelationship of "Ke"?

Likewise, the plaintiff's legal fees and costs continue to escalate rapidly. One way irreparable injuries may be partially compensated for is by the payment of accrued legal fees and costs, and all expenses necessary for the plaintiffs to defend their rights as the Court will order herein.

There is Substantial likelihood the Movants Will Succeed on the Merits

The plaintiffs stand more than an excellent prospect of success of prevailing on the merits in these proceeding given the presentation and testimony to date. Pursuant to the FSLA, the time cards are irrelevant as a reason for disciplining or terminating Ms. Singer and Mr. Riggs. Even speaking in the opposite even if Singer's fraud charge (which has been found to be not true by this Court) were taken as possibly true, that does not excuse the denial of due process and equal protection as evidenced herein.

Defendants have produced no well-founded or substantial evidence to rebut the plaintiffs claims of rights deprivation; and, the defendants have placed at risk numerous patients by billing policies they are using to continue to turn away otherwise eligible Native

Americans from vital medical and emergency care at the Montezuma Creek Clinic, in violation of IHS contracts and regulations û not to even mention elementary common human dignity for their fellow man.

Patterns of Bad Faith Toward the Court

Bad faith conduct towards the Court and all the surrounding circumstances as are found to be true and appropriate in the sound discretion of this Court, can likewise be grounds for the plaintiffs to prevail. Herein, the Court sees as obvious the harm to the public and plaintiffs' rights and the waste of judicial processes in this Court by the plaintiffs repeated misrepresentations of fact and law; spoliation of evidence; witness intimidation and tampering; obstructing testimony; sandbagging of evidence; and repeated and substantive violations of the Navajo Nation Rules of Civil Procedure.

Misrepresentation of facts and law in violation of NNRCP at Rule 11. On May 14, 1999, Rule Violations. The defendants' have accumulated and advanced a substantial and impressive list of substantive rule violations under the Navajo Nation Rules of Civil Procedure which remain currently before the Court in various summary motions. The defendants, for example, plead fraud, without one piece of evidence as to Singer's intent to commit fraud. and without the specificity of pleadings as required by the Navajo Nation Rules of Civil Procedure at Rule 9. Despite this, local and international newspaper coverage published the ill-plead claim since it was in the May 14, 1999, 'Answer' of the defendants. The defendants have purposefully subjected Ms. Singer, Mr. Riggs; and Mr. Dickson, to a trial by tabloid.

All of the above enumerated actions of the defendants and defendants' counsel, have here constituted a pattern of behavior that only magnifies and exemplifies past and continued deprivations of the plaintiffs' inalienable rights, be they tribal or federal in nature, and harm to Native American patients and community in the Montezuma Creek area of the Utah Strip. As like in Gudac, such actions demonstrate the arrogance of the defendants, their cultural insensitivity, and the contempt and disdain in which they hold this Court; the Navajo Nation judicial system; and Native Americans in general.

Damages such as deprivation of rights; discrimination denial of due process; infringements on freedom of speech; denial of dignity; and impunity of a person's reputation are all deprivations that far exceed mere deprivation of money, or employment or embarrassment. These constitute "direct action.... potent with circumstances... irretrievable." Adams v. Vance, 570 F.2d 950, 953 (1978). No amount of money, no availability of any Order of the Court, can fully-compensate the plaintiffs and the Native American population in the Montezuma Creek for these past and ongoing substantial and inestimable damages.

While not controlling in the Navajo Nation Court as a matter of law it is at least instructive that this Court look to our sister sovereign through its Tenth Circuit and see that when the United States of America finds that when the three requirements of injury, ongoing harm, and more potential harm to the plaintiffs outweighs the harm to the defendants, then the plaintiffs need "only show that they have raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation", Tri-State Generation and Transmission Association, Inc. v. Shoshone River

Power, Inc., 805 F.2d 351, 358 (10th Cir. 1986). Here, to date, facts show, that not only are three defendants called the plaintiffs 'bold faced liars' as to activities at the Clinic, injuries to the Native American patients of the Clinic, and misrepresented Sampson v. Murray, upon which the Court relied to discharge its TRO. If minimal research had been done by the defense, and the truth had been told, and which Navajo Nation case law depended upon, the TRO could have easily been simply replaced by the Preliminary Injunction on May 14, 1999, with no further deprivations to the plaintiffs of rights, time, money, embarrassment and loss of reputation by a trial by tabloid conjured by the defendants. Further, numerous diabetic patients would not have continued to go without treatment for a life threatening disease.

Spoliation of evidence. Evidence submitted with the time cards of the Districts time cards shows, Richard Bailey's time card, that was viewed by plaintiffs Counsel and Bryan Bolander, is missing. This card showed Bailey represented he worked 80 hours with a hand written '80' on a card he signed when he was working full time for San Juan County as the County Administrator, and as well claimed full time employment in the same time period with the San Juan Health Services District. Mr. Bailey was never disciplined for working in one place full time while he was employed full time at another and drawing full compensation from both positions at the same time.

Witness Intimidation. Debbie Benally testified she had never spoken with Mr. Wood prior to the day before her testimony, at which time he warned her over the telephone in the evening hours just before her anticipated testimony, as he did Ms. Singer personally, "you need to remember who you work for".

Ora Lee Black in her testimony stated the reason she did not wish to testify on Singer's behalf, or submit her affidavit which she declared to be true in all respects.

Ora Lee Black testified that she and the other nurses bad been told "not to get involved" in the case by Reid Wood, after submitting their affidavits in support of Ms. Singer in respect to her position as manager of the Montezuma Creek Clinic.

Surprise and Prejudicial Evidence. Nearly all of the defendants' evidence was submitted to the Court, despite prior discovery applications as provided for in the Navajo Nation Rules of Civil Procedure, in the last hour or so of a 19 hour hearing, without notification or review by plaintiffs' counsel prior to its presentation in the September 24, 1999, hearing elements satisfied, but overwhelmingly, it is also the case that the fourth prong has been met.

The Navajo Preference in Employment Act defines the rights of employees in the work plate of the Navajo Nation. The Navajo Preference in Employment Act has been violated by lack of clear warnings; lack of a fair hearing process; retaliation for grieving discriminatory acts; and lack of willingness to eliminate the problems. If the Navajo Preference in Employment Act has been violated, it is presumptive that the Native American employee's rights have been violated and Navajo Nation public policy has been undermined and disregarded for naught.

Chilling Effect

Resultantly if injunction does not issue herein the public, Native American and non-Native American alike, will believe erroneously that nothing can be done when

the San Juan Health Services District or when any other entity; organization; group; or individual violates their rights, and such an assumption will have a chilling effect upon others who may wish to come forward with similar claims, and suppress such efforts to the detriment of all Native Americans and non-Native Americans alike. Such is not the foundation of a free society, and shall not be commenced here.

Conclusion

The defendants have, compared:

Failed to show how a service district, a minor political subdivision, is an "arm of the state" with immunity under Alden, et al. v. Maine, ___U.S. , Docket No. N8-436, when Alden exempts minor political subdivisions from immunity; and,

Failed to show how civil rights violations are given immunity when Alden v. Maine exempts those types of injuries from immunity, and Alden did not address Navajo civil rights as defined within Navajo custom and traditions; and,

Failed to show how a special service district not implementing a merit system within the Utah Special District Personnel Management Act as "is established" by the Utah legislature, can be an "arm of the state" if it is violating the laws of the State within which it seeks to obtain immunity; and,

Failed to show how a minor political subdivisions limited governmental authority exceeds that of the entire Navajo Nation sovereignty, particularly when the injury sustained by the plaintiffs so specifically directly effects the health and welfare of the Navajo Nation

chapters and their residents pursuant to the Montana exception of Strait v. A-1 Contractors; and,

Failed to show how minor political subdivision of a State can benefit itself an the taxpayers of the district by voluntarily seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries, and then treat the Navajo Nation's customs and traditions; Bill of Rights; the Navajo Preference in Employment Act; the Utah merit system requirements, and HIS contract obligations, all with impunity, and believe that the district is somehow now immune from claims injury; and further,

Failed to show, or raise any issue or defense, as to the transcription records of the proceedings herein being unavailable by their inaudibility, despite the order of the Court the 9th of November, 1999, to notify the Court of any problem, and therefore the Court finds that the parties have waived any such issue or defense thereto; and,

Accordingly, as set forth fully in the foregoing, injunctive relief is overwhelmingly justified and shall issue immediately. It is clear and convincing to the Court that the plaintiffs have (1) demonstrated to the Court that they have a claim framed in a protectable right or interest and have a high likelihood of success on the merits; (2) that are likely to suffer irreparable injury, loss, or damage to that protectable right or interest unless injunctive relief is issued; (3) that the likely injury, loss or damage to the plaintiffs are substantial in nature and character; and (4) that the plaintiffs do not have an otherwise available and adequate remedy at law. These protectable rights include denial of due process; denial of equal protection; denial of free speech and assembly; defamation; theft; conspiracy; and

interference with the public policies of the Navajo Nation.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED:

That the defendants be and are hereby ordered to immediately reinstate Ms. Singer and Mr. Riggs to their previous positions of employment as was occurring on the 1st day of November, 1998; and,

That the defendants be and are hereby ordered to immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due to him from the occasion of being eligible for such status; and,

That the defendants be and are hereby ordered to immediately pay all lost income from whichever source derived within the District, including but not limited to full back pay and compensation as well as back benefits to the plaintiffs, including but not limited to retirement benefits and other compensations regularly received by the plaintiffs with all such compensations to be credited and/or paid immediately; and,

That the defendants be and are hereby ordered to delete and expunge all the charges and writings pertaining to the December 2nd through the December 8th 1998 charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer's personnel file, with a letter so stating the expungement to the plaintiffs and to this Court; and,

That the defendants be and are hereby ordered to not put Ms. Singer, and other like managers, and Mr. Riggs,

and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensations or otherwise; and,

That Ms. Singer be returned to her role and position as a technician for and on behalf of the San Juan Health Services District and,

That the defendants be and are hereby ordered to not interfere with clinic operations or move any clinic personnel; and,

That the defendants be and are hereby ordered to issue full payment of attorney's fees, costs, and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the 31st day of December, 1999, by and through the Registry of this Court and,

The Court orders a waiver of any security deposit due to (a) the limited financial circumstances of Ms. Singer, Mr. Dickson, and Mr. Riggs and (b) SJHSD's placing of Montezuma Creek Clinic employees in jeopardy as the transition from state to local tribal management nears; and,

The Court order that the defendants be and are hereby prohibited from:

Eliminating Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic; and,

Interfering with the laboratory services to the Montezuma Creek Clinic; and,

Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic, and

immediate payment of all current and past due billings; and,

Interfering with any form of patient care, by, among any other matter or things, billing IHS patients; and, Interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic; and,

The Court further hereby Orders the defendants to assist the Montezuma Creek Clinic and the local Navajo Chapters, and chapter governments, by any means necessary, including Navajo and Ute language announcements on Navajo Nation wide radio; letters, etc. to help diabetic IHS patients to return to the clinic for treatment, including informing such Native American patients that as an IHS patient they do not have to directly pay for their health care treatment at the Montezuma Creek Clinic; and,

The Court further Orders that the plaintiffs report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court; and,

The proceedings in chief herein be and are hereby scheduled for initial pretrial conference by this court, unless these proceedings are not earlier settled and compromised by the parties by stipulation on the limited factual; legal; and damage issues remaining.

So Signed and Ordered this 28th day of December 1999, at 4:45 PM.

The Honorable Raymond A. Begaye
District Trial Judge of the Navajo Nation

EW 33a

SR-CV-162-99

IN THE DISTRICT COURT OF THE
NAVAJO NATION JUDICIAL DISTRICT
OF SHIPROCK, NEW MEXICO

DONNA SLNGER; Fred Riggs C#1 8570;
Alison Dickson C#212,765;
Plaintiffs,

vs.

SAN JUAN COUNTY; San Juan Health Service District; Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy1; John Lewis Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway2, and other John and Jane Does as yet unnamed in their personal and official capabilities,
Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISSOLVE OR MODIFY THE PRELIMINARY INJUNCTION ORDER

THE COURT having received and reviewed (1) the defendants' "Motion to Dissolve or Modify Findings Opinion and Judgment at Preliminary Injunction" and (2) the plaintiffs' response to the same motion, hereby denies the defendants' motion, and makes the following findings of fact and conclusions of law, that will incorporate herein and add to the original Preliminary Injunction Order raised in issue, as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. The defendants accuse the Court throughout their motion of the Court denying the defendants due process of law in claiming the defendants were denied the services of an in courtroom certified court reporter.

Findings of Fact

The defendants requested by written motion that they be allowed to have a certified court reporter take oral transcription of the proceedings before the Court. The request was responded, in written response stipulating to the defendants motion. The Court granted the motion. The defendants never presented any qualified reporters for consideration of the Court The Court is not responsible for what the defendants did not do.

The defendants were never denied the opportunity to have a Court Reporter present in the Courtroom; were never denied the opportunity to make further motions concerning the said reporter in the numerous hearings between April 24 and November 9, 1999; and were never denied the opportunity to make a written motion at any time in the last nine months. The only restriction on the reporter was that any such reporter would be able to perform their reporting services for non-Navajo, as well as Navajo speaking witnesses, and that counsel for the defendants was advised to seek out the services of the federal interpreters office in Albuquerque, New Mexico, for a listing of qualified Navajo speaking reporters and it was likewise the case that the Court ordered the reporter to provide copies of the transcripts to both parties and this Court. The plaintiffs even concurred with the motion for the reporter.

Likewise it was only the plaintiff Riggs, thusfar, who was prejudiced by the lack of a qualified reporter inasmuch as Navajo (his first language) was his preferred language in portions of his testimony and he was denied the use of his own language in deference to the defense.

Conclusion of Law

The defendants were not denied due process of law and were provided with every opportunity to be heard as required by Navajo common law; by Navajo statutory law; by Navajo Rules of Civil Procedure; by applicable US law by the Navajo Nation Bill of Rights, and by the 1968 Indian Civil Rights Act. The defendants submitted motions; two 'Answers' ; filed, responded to and argued motions; called witnesses; and even by the defendant own accord they invoked the jurisdiction of this Court on its own initiative by seeking the Court's authority and jurisdiction over its own counterclaims filed in this Court seeking its own independent damages as against the defendant Singer. No Court rulings prohibited them from further participation in any form or fashion. No Court order denied them the privilege of using a certified court reporter.

"[T]he fundamental requfrement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutionaiprotection is invoked" Anderson National Bank v. Luckett 321 U.S. 233. 246.

This court cannot possibly understand why it would be responsible for securing a qualified court reporter on behalf of the defendants. Those duties and responsibilities fall squarely on the shoulders of the defendants and their counsel the defendants requested

the reporter - the defendants motion was granted with conditions and the defendants failed thereafter to pursue and protect their interests as granted.

It is not the duty of the Court to provide a reporter, other that what is provided under the limited budget of the Court. It is, however, the case that this Court determine the qualifications of those persons to whom it would entrust the record of the Court for purposes of accuracy and trustworthiness of the record. The Court is not obliged to simply rely on the representations of the party seeking the assistance of an independent and qualified court reporter. A court reporter is essentially an officer of the Court, not an agent of the party paying the reporter.

II. The defendants argue to the Court that they were denied due process of law due to a lack of a perfect record of the proceedings before the Court for cause of interment inaudibles found in the Courts own recording/reporting system.

Findings of Fact

The defendant and plaintiffs were ORDERED from the bench to report any problems with the hearing transcripts to the Court on November 9, 1999, and neither party did so. Both the defendant and the plaintiff became aware of concerns in the transcription of the taped proceedings nearly a full month prior to submitting their written conclusions, by written notice, as was the Court. In fact, after the very first proceeding it was cautioned by counsel for the plaintiffs, Wm. P. Battles, that the record was being garbled and asked that the Court caution the speakers in reference to preserving the record. The defendants, as well as the plaintiffs, were free to make motions for new hearings

or other protective motions prior to the filing of their written concluding statements, but failed to do so and instead like the plaintiffs submitted their closing arguments on the record as presented.

Wherein the trial record as a whole, including hearings on April 24, 1999; May 14 1999; June 30, 1999; and November 9, 1999; along with records of the September 23rd and 24th proceedings, of 1999, are all available to this Court and the parties, and well evidence the foundation and outcome of the Courts considerations in rendering the decision to grant the Preliminary Injunction despite the lack of a "perfect" trial record as claimed required by the defense.

The defendants knew they were obligated to put on evidence to rebut the plaintiffs evidence and simply failed to do so. Indeed, moreso than not, the record and recollection of the Court actually reflects that the majority of the evidence and testimony solicited and Presented to the Court by the defendants actually went to support each and every claim of the plaintiffs as raised in these proceedings. Accordingly, the defendants failed to offer the Court barely so much as one piece of evidence that was reliably found to be admissible within the Navajo Nation Rules of Evidence, or in aid to their assertions contrary to those of the plaintiffs.

Conclusions of Law

The defendants were not denied due process pursuant to the 'harmless error' rule of Chapman v. California, 386 US. 18 (1967) that overturned the case of Griffin, upon which the defendant would apparently prefer the Court to rely as they assert - and for which the defendants, through counsel, had a responsibility to inform the court

of, in that Griffin had been superceded by Chapman - but failed to do so.

Further, the defendants are not being denied the ENTIRE court record, as found in the cases they rely upon and therefore defendants' case cites are without merit in this case but in misguiding this Court.

The Court therefore concludes that as a matter of law, notwithstanding our own Rule 61 of the Navajo Nation Rules of Civil Procedure, and in agreement to Chapman the existence of inaudible sections of the tape recordings is harmless, when the record can still remain to be considered in its whole dispositive of the findings, conclusions and orders of the Court.

As offered by the United States Supreme Courts

"Since Chapman, we have "consistently made dear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations." United States v. Hasting, 461 U.S. 499, 509 (1983). In Hasting we again emphasized that "given the myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibiity of the participants, there can be no such thing as an error-free, perfect trial, and . . . the Constitution does not guarantee such a trial." Id, at 508-509. " United States v. Lane et al 474 U.S. 438. 446 (1986).

The Court here, in considering the trial record as a whole, finds the same well supports the findings and conclusions of this Court without any question in the mind of the Court whatsoever.

III. The next argument offered by the defendants is that the Preliminary Injunction should be denied or modified because the findings go to the merits of the case.

Findings of Fact

The burden of coming forward in the seeking of a Preliminary Injunction, premised on the case in chief under the Navajo Nation Rules of Civil Procedure, is elementary. Pursuant to Rule 65(c) the moving party, here the plaintiffs, are put to the burden of "presenting evidence sufficient for the court to find all of the following"

That the moving party has or is claiming a protectable right or interest and has a high likelihood of success on the merits;

That irreparable injury, loss, or damage, to that right or interest is likely to occur unless the preliminary injunction is issued;

That the threatened injury, loss or damage is substantial in nature or character; and

That the moving party does not have an adequate remedy law.

Likewise, Rule 65(d) of the Navajo Nation Rules of Civil Procedures, provides, for judicial economy, not dissimilar from any other jurisdiction of our sister sovereign the United States, that

Before or after the commencement of the hearing of a petition for a preliminary injunction, the court may order trial on the merits to be advanced and

consolidated with the hearing of the petition. Even when this consolidation is not ordered, any evidence received upon a petition for a preliminary injunction, which would be admissible upon the trial on the merits becomes part of the record at trial and need not be repeated at trial. This subdivision shall be construed to save the parties any rights they may have to trial by jury.

The Defendants were warned several times during the proceedings that they were failing to meet their responsibility of rebutting the plaintiffs evidence and testimony and that they were proceeding in nearly a fatal fashion to not only the preliminary injunction but as to the case in chief and that likewise they were thus far actually reinforcing the contentions of the plaintiffs in defense witness after defense witness, and the collective of the evidence and testimony before the Court was overwhelmingly in favor of the plaintiffs.

And accordingly,

The plaintiffs proved absolutely that they were being denied protectable rights which were guaranteed at law and therefore had a certain likelihood of success on the merits - which is largely reduced to damages; and,

The plaintiffs likewise proved that unless relief was granted, by way of a preliminary injunction or otherwise, that such violations on their protectable rights would continue with resulting injuries, losses, and damages.

That the injuries, losses, and damages were substantial in both their nature and character, including injuries ranging from damages to reputation to money damages; and,

And that unless a preliminary injunction was granted the harm, injuries, damages, and losses, would continue unimpeded.

Likewise, the Court is obliged by Rule of Court and in the exercise of judicial economy to receive during the proceedings on the preliminary injunction evidence which is likewise admissible in the case in chief trough occurring during the trial on the merits, and that evidence becomes a part of the record at trial and need not be repeated at trial. See Rule 65(d). Such preservation of the record does not go to taint the trial by jury requested by the plaintiff but does substantially reduce their burden of proof which has already well been met even as to the case in chief. Whereas, as the Court would note, that but for the preservation of trial by jury, in most instances of preliminary injunctions it is more normal to actually combine the proceedings in chief with the proceedings for the preliminary injunction.

For example, Lauren Schafer, a defendant's witness, admitted on September 24, 1999, that after an exhaustive study of Mrs. Singer's records, she did not have one piece of evidence as to Mrs. Singer's intent to commit fraud.

For example, the Court observed that the person who initiated the termination process, was also the grievance hearing officer (unbeknown to Singer) and admitted he had a problem with being so thinking that it was improper for him to proceed by his own judgment but did nonetheless.

For example, no defenses were made for the treatment of Fred Riggs and Al Dickson, except that the time card errors diminished after the discipline meted out,

supporting the theft claim of the plaintiffs in that their reputations were taken without their permission for use of the district to discourage time card errors and for speaking out regarding discrimination and unequal treatment of Native Americans in employment with the Health Services District.

For example, the defense presented evidence that the reason that Singer was fired was because she allegedly called in to work to have someone punch her time card, and then offered testimony of one witness that such conduct was common among the employees of the Health Services District, and so common in fact that she herself had certainly done the same thing "at least a hundred times" but had never even been disciplined in any form or fashion. This witness was non-Indian.

For example, human beings being somehow seriously referred to in such a way as to make people believe because they are Native Americans they are being called dogs is only something this Court would prefer to hear the evidence on only one time - in its life time.

For example, coming to understand that because Native American elders, grandmothers, and grandchildren are being denied medical care and treatment even as under a direct government contract with the United States Government to provide health care to Native Americans because they are being arbitrarily required "to show their Certificate of Indian Blood" to actually receive necessary health services, when the required documentation for Health Services through the Indian Health Service is a "Beneficiaries Identification Card" at most, is something this Court would have preferred to have never heard.

The Court's resources, and the plaintiffs resources are limited - and the findings, facts and case are clear, even as to the merits in chief.

Conclusions of Law

The findings of the Court had no alternative but to reach to the merits, as such is the primary burden of the plaintiffs coming forward. The plaintiff had a clear duty to demonstrate to the Court that they are substantially entitled to judgment on their case in chief, in order to prevail on the preliminary injunction. The defendants, likewise, failed to put on any credible evidence to rebut the volume of testimony and evidence of the plaintiffs, after having ample opportunity to have done so.

The Court is therefore well within its rights to find to the merits, the same way as a Court may find for a party if the plaintiff fails to prosecute a claim, in order to protect the due process rights of the plaintiffs, and to protect the Court's processes from being used for harassment and other wasteful and abusive purposes.

The Court, given the proceedings to date, the testimony and evidence of record, is obligated to grant relief to the plaintiff and provide relief to those harmed, damaged, and injured.

"Courts invested with the judicial power of the United Stases have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities. " Chambers v. NASCO, Inc., 501 U.S. 32, 43-46 (1991); Link v. Wabash R. Co., 370 U.S. 626, 630-631 (1962). The Supreme Court recognized in Roadway Express that outright dismissal of a lawsuit, which has been upheld in Link, is a particularly severe

sanction, yet is within the court's discretion. 1st Sess., 6 (1852); Roadway v. Piper, 447 U.S. 752, 765 (1980)."

The Preliminary Injunction was addressed to rectifying the harm done. The defendants' recommendation fails to address the financial harm suffered by the plaintiffs which has injured their families, as well as, failing to recognize, much less rectify, the harm to their reputations and the patients. As such, the Court finds the Injunctive Order is well within the three prongs of Missouri v. Jenkins, ____U.S. .____ (1995), at page 16. The defendants neither recognized the three prong test of Missouri in their pleadings, nor recognize the Navajo tradition of compensating injury with money or other things of recognizable uniform value.

The defendants' definition of 'status quo' differs from the Court's, in that, the Court's definition wishes to place the plaintiffs in nearly as good a position as they would have been without the harm of the defendants, and that includes financially.

IV. The defendants rather vaguely continue to misstate and minimize the Court's jurisdiction.

Findings of Fact

A 'forum of resolution' and the premise of having a hearing for injured parties among Native American people predates the European settlers and is well grounded in Navajo customs and tradition. This tradition has continued through the continuum of history, and in contemporary time has come to include the provisions of the United States Congress by way of the 1968 Indian Civil Rights Act which colored tribal courts with federal legislative mandates in 25 USCS § 1301.

And accordingly the Court cites to tribal code and Montana and Strate to further its finding of jurisdiction.

Conclusions of Law

The Court has jurisdiction over the defendants partly because they are the named parties who have committed acts within the Navajo Nation territorial boundaries, and as well because the defendants became plaintiffs by filing their counterclaims. In accord with Dodge v. Nakai, 298 F. Supp.. 17 (Ariz. dist. 1968) and Clark v. Barnard, 108 U.S. (1883). This Court has jurisdiction.

Alternatively, the Court also has jurisdiction over the defendants because, even if the defendants are an 'arm of the state', (which they have not shown any evidence to support), the defendants waived any rights of immunity when they filed counterclaims and fully participated in the Court proceedings. The Court therefore concludes that it has legal foundations for jurisdiction in this case, within the Navajo Nation's inherent sovereignty, the Navajo Nation Code, 25 U.S.C.S. §1301 and 1302, the Montana and Strate decisions, and the United States Supreme Court rulings in Clark v. Barnard, 108 U.S. (1883) as cited approvingly in College Savings Bank v, Florida Prep Aid Postsecondary Education Expense Board et al. U.S._____ decided June 23, 1999.

"We are relieved, however, from its consideration by the voluntary appearance of the state in intervening as a claimant of the fund in court. The immunity from suit belonging to a state, which is respected and protected by the constitution within the limits of the judicial power of the United States, is a personal privilege which may waive at pleasure; so that in a suit, otherwise well

brought, in which a state had sufficient interest to entitle it to become a party defendant. its appearance in a court of the United States would be a voluntary submission to its jurisdiction, while, of course, those courts are always open to it as a suitor in controversies between it and [108 U.S. 436, 448] citizens of other states." " Clark v. Barnard 180 U.S. 436, 448 (1883).

In conclusion, the Court finds the arguments and case cites of the defendants without merit or legal foundations. The Court, despite previous denials, now attempt to justify their placing of Native American patients in danger in a cloud of "confusion" on the 14th day of May, 1999. The prior Temporary Restraining Order directed the defendants to not interfere with the Clinic operations. This effort of the defendants at this juncture lacks sincerity. The defendants' motion to dissolve the preliminary injunction lacked even so much as an apology for the harm they have done over the last nine months of billing indigent Native American patients discouraging their attendance to both emergency and routine health care. The motion of the defendants lacks even the smallest appreciation for their blatant violations of civil rights of the plaintiffs that has torn a family apart, and grossly harmed the plaintiffs, and innocent patients and families relying on the clinic for health care.

Likewise such cold, insensitive and recalcitrant attitudes on the part of the defendants further goes to illustrate the defendants bad faith to these proceedings and present a foundation from which so much prejudice can grow from like a scavenging parasite of people ignorant of the harm of their malignant acts, and who lack any remorse for their harm to the plaintiffs, the patients and this Court.

The Preliminary Injunction, and findings of the Court, accordingly shall remain undisturbed. To do so would continue to place Navajo employees and patients who the defendants interact with at both Montezuma Creek Clinic and at Monument Valley, in harm's way. Navajo common law, is customs and traditions, mandate that the Court protect the people, and this Court shall not hesitate to exercise all its powers to do so.

The Motion to Dissolve or Modify the Preliminary Injunction Order be and is, therefore, denied.

IT IS THERFORE ORDERED that pursuant to the Navajo Nation Rules of Civil Procedure at Rule 11 and this Court's tribal and federal authorities, and the Court's recognized inherent authority to protect its judicial processes, the Court hereby ORDERS as follows pursuant to its Preliminary Injunction:

That the Motion to Dissolve or Modify the Preliminary Injunction Order be and is hereby denied.

The Preliminary Injunction as issued shall be carried out immediately, and no later than the 3rd day of March, 2000, in all respects, with written confirmation delivered to this Court on or by that date, or be subject to the contempt powers of this Court.

That the defendants be and are hereby ordered to immediately reinstate Mrs. Singer as a x-ray and ultrasound technician making her whole to the 1st day of November, 1998, not later than the 3rd day of March, 2000, with written confirmation delivered to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court.

That the defendants be and are ordered to immediately reinstate the plaintiff Mr. Riggs to his previous position of employment and compensation as occurring at the time of his reduction in force and reduction of pay with written confirmation delivered to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to immediately tender to Mr. Dickson full time status as an employee of the Montezuma Creek Clinic and that he be paid all commensurate back pay and benefits as may be due to him from the occasion of his being eligible for such status; and provide written confirmation of such compliance on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to immediately pay all due income from whichever source derived within the District, including but not limited to full back pay and compensation as well as back benefit to the plaintiffs, including but not limited to retirement benefits and other compensations regularly received by the plaintiffs with all such compensations to be credited and/or paid immediately with confirmation of such compliance delivered in writing to this Court on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to delete and expunge all the charges and writings pertaining to the December 2nd through the December 8th 1998 charges of fraud, discipline, and termination, from Mr. Riggs and Ms. Singer's personnel file, with written compliance delivered to this Court on or by the 3rd of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to not, within the territorial jurisdiction of the Navajo Nation, put Ms. Singer, and other like managers, and Mr. Riggs, and other like Physicians Assistants, on hourly time card keeping requirements for the purposes of salary and compensations or otherwise, and provide a copy of the written policy to this effect on or by the 3rd day of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to not interfere with clinic operations or move any clinic personnel, or be subject to the contempt powers of this Court and,

That the defendants be and are hereby ordered to issue full payment of attorney's fees, costs, and expenses associated with these proceedings to date to be paid by cashier's check within five working days of the issuance of the injunction and to be paid not later than the 31st day of March, 2000, by and through the Registry of this Court, or each and every one of the defendants shall be subject to execution on their personnel properties, and otherwise individually subject to the contempt powers of this Court and,

That the prior Order of the Court waiving any security deposit of the part of the plaintiffs be and is hereby affirmed; and,

That the Defendants be and are hereby prohibited from:

Eliminating any Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic or any other facility or activity

of the San Juan Health Services District conducted within the territorial jurisdiction of the Navajo Nation; and, Interfering with the laboratory services to the Montezuma Creek Clinic or any other facility or activity of the San Juan Health Services District conducted within the territorial jurisdiction of the Navajo Nation and,

Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic or any other facility or activity of the San Juan Health Services District Conducted within the territorial jurisdiction of the Navajo Nation

That the defendant shall immediately make payment of any and all current and past due billings of the Montezuma Creek Clinic occurring before the 1st day of January, 2000, and provide written confirmation of such payments on or before the 3rd day of March, 2000, or be subject to the contempt powers of this Court and,

That the defendants be and are prohibited from interfering with any form of patient care being provided by the Montezuma Creek Clinic; and,

That the defendants be and are hereby immediately ordered to cease billing eligible IHS patients for medical services; and,

13. That the Court further hereby Orders the defendant to assist the Montezuma Creek Clinic and the local Navajo Chapters, and chapter governments, by any means necessary, including Navajo and Ute language announcements on Navajo Nation wide radio; letters, etc. to help diabetic IHS patients to return to the Montezuma Creek Clinic for treatment, including informing such Native American patients that as an IHS

patient they do not have to directly pay for their health care treatment at the Montezuma Creek Clinic, with written confirmation of such compliance provided to this Court on or before the 3rd of March, 2000, or be subject to the contempt powers of this Court and,

14. That the Court further Orders that the plaintiffs report any such interference, harassment, or intimidation of Montezuma Creek Clinic operations, patients, and employees immediately to this Court; and,

That the proceedings in chief herein be and are hereby scheduled for initial pretrial conference on the 18th day of April, 2000, unless these proceedings are not earlier settled and compromised by the parties by stipulation on the limited factual; legal; and damage issues remaining as previously noted to the Court.

So Signed and Ordered this 1st day of March, 2000.

JUDGE, District Court of the Navajo Nation

"I hereby certify that this is a true and correct copy of the instrument on file in the District Court of the Navajo Nation."

Clerk, District Court of the Navajo Nation

1. That in the event that the defendants fail to obey the Order of this Court, commencing the 4th of March, 2000, the defendants shall be fined at the rate of $10,000.00 (Ten Thousand Dollars) per day, for each and every day the Order of this Court is not carried out in its entirety.*****

2. That each and every personal defendant and defendants counsel will pay $1000 per day of the $10,000

daily fine beginning on March 2, 2000, from their own personal assets.

3. That any and all appeals or attempted appeals will not forestall these fines if the Preliminary Injunction Order is not carried out in accord with this Order.

4. Such fines are a fair and just means for this Court to protect its judicial processes, and to ensure its orders that protect the people, will be carried out.

EW 53a

SR-CV-162-99-CV

IN THE DISTRICT COURT OF THE
NAVAJO NATIONJUDICIAL
DISTRICT OF SHIPROCK, NEW MEXICO

DONNA SINGER, Fred Riggs C#18570;
Alison Dickson C#212,765.
Plaintiffs,

vs.

SAN JUAN COUNTY; San Juan Health, Service District: Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy; John Lewis; Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway; and other John and Jane Does as yet unnamed in their personal and official capabilities,
Defendants.

SPECIAL ORDER IN AID TO SATISFACTION OF PRELIMINARY INJUNCTION

NOW COMES THE COURT and having received and reviewed the plaintiffs' motion for a special order and finding good cause therein hereby Orders as follows:

1. That the defendants are hereby restrained from alienatingany and all money, property and assets of any type until the plaintiffs are paid their relief as granted in the Preliminary Injunction Order, and.

2. That a list of all assets be immediately given to the plaintiffs since the defendants admitted in their concluding statement that the defendants state of finances were in a precarious position; and.

3. That defendants immediately list the plaintiffs first in order of priority as secured creditors on the files of the County Recorder of San Juan County and any other county wherein their property is located; and.

4. That the defendants provide a complete income tax return for 1998 and 1999, including all attachments and schedules submitted to the IRS with the returns; and.

5. That any disobedience to this Order will be viewed as contempt of the Court and warrants for the arrest of the defendants disobeying this Order will issue; and

6. That the plaintiffs are granted leave to seek enforcement of this Order as appropriate in any Utah or federal Court where it will be enforce pursuant to principles of comity and applicable law.

So signed and this 6 day of March, 2000.

JUDGE RAYMOND A. BEGAYE

"I hereby certify that this is a true and correct copy of the instrument on file in the District Court of the Navajo Nation."

Clerk, District Court of the Navajo Nation

"I hereby certify that this is a true and correct copy of the instrument on file in the District Court of the Navajo Nation."

Clerk, District Court of the Navajo Nation

EW 55a

SR-CV-162-99-CV

THE DISTRICT COURT OF THE
NAVAJO NATION JUDICIAL
DISTRICT OF SHIPROCK

DONNA S1NGER Fred Riggs C#18570;
Alison Dickson C#2 12,765;
Plaintiffs,

vs.

SAN JUAN COUNTY; San Juan Health Service District; Rick Bailey; Reid Wood; Lauren Schafer; Craig Halls; Commissioner Bill Redd; Roger Atcitty; Commissioner Mark Maryboy fn1; John Lewis; Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway fn2; and R. Dennis Ickes, Farmers/Truck Insurance Co. and John and Jane Does as yet unnamed in their personal and official capabilities.
Defendants.

ORDER MANDATING THAT ALL DEFENDANTS' TO BE BOUND BY THE PRELIMINARY INJUNCTION ORDER

Now comes the Court, having received and reviewed the plaintiffs' motion to bind the defendants R. Dennis Ickes, Esq. and Farmer's Insurance Group of Companies and/or Truck Insurance by the Preliminary Injunction Order, based upon the findings of the Court in the Preliminary Injunction Order, after approximately 6 hearings over a nine month period. The Court bases this Order upon the following findings of fact and Conclusions of Law.

1. On December 28. 1999, the Court made factual findings pertaining to misrepresentation of case law and Sets, intimidation of witnesses, spoilation of evidence, upon which the plaintiffs have made a motion for a supplemental pleading, and that said activities were known, or should have been discovered easily by a reasonable investigation that is required pursuant to NNRCP at Rule 11; and,

3. That the new defendants, Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance, as based upon the Court's findings, did participate in these activities prior to the issuance of the preliminary injunction order, and,

4. That the new defendants, Mr. Ickes and Farmer's Insurance Group of Companies and/or Truck Insurance, did participate fully in all the proceedings from approximately April 23, 1999 through November 9,1999, and in the defendants' motion to dissolve or modify the Preliminary Injunction Order, dated December 28, 1999; and,

5. That Mr. Ickes, and Farmer's insurance Group of Companies and/or Truck Insurance Company, as his employer, were aware, or should have been aware, of the actions of the defendants, and their own actions in privity with the defends based upon a reasonable investigation as required pursuant to NNRCP at Rule 11; and, Therefore, the Court now Orders that Mr. Ickes and Farmer's insurance Group of

Companies and/or Thick Insurance Company are to be bound in privity with the previous defendants in this action as now identified John and Jane Does, who prolonged the proceedings, end further deprived the plaintiffs' of due process and equal protections of the

law, and are hereby bound by the Preliminary Injunction Order of December 28, 2000 red their names be herein after, added to the defendant caption, and are officially declared to have responsibility for all legal liabilities incurred by the defendants as declared in the December 28, 1999. Preliminary Injunction Order.

Signed this 27 day of 2000.

Judge Raymond Begaye

"I hereby certify that this is a true and correct copy of the instrument on file in the District Court of the Navajo Nation."

Clerk, District Court of the Navajo Nation

Footnotes

fn1 In his official capacity only.

fn2 In her official capacity only

EW 58a

No. SR-CV-1 62-99-CV

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK

Donna Singer, Fred Riggs, Al Dickson
Plaintiffs,

VS.

San Juan County, San Juan Health
Services District, et al
Defendants.

ORDER

Clarifying the March 1 , 2000 Order
Judge Raymond Begaye

NOW COMES THE COURT, responding to the Plaintiffs' request for clarification of this Court's orders of March 1, 2000, as follows:

The proceedings before the Court above- titled was decided following full hearing and review premised on testimony and evidence presented in full open Court and upon findings thereto. This Order of clarification is not a new proceeding.

On December 28, 1999 this Court issued the a Preliminary Injunction premised upon the Plaintiffs' application for an injunction and made findings of fact and conclusions of law found therein, based upon irreparable harm to the Plaintiffs, patients and the Navajo citizens, by the defendants violations of Navajo Law.

On March 1, 2000 this Court issued an Order denying the Defendants motion to dissolve the Preliminary Injunction based upon the facts and law contained therein. Orders of March 2, 2000 and March 15, 2000 were issued to assist in carrying out the orders. None of the facts or law are being reviewed in this Order.

This Court has not received any form of confirmation of satisfaction of any such forestated provisions as was ordered, and the same remains in full force and effect This Court has the duty, authority, and wherewithal to interpret the orders and explain to the Defendants how to carry out these Navajo legal mandates. Impossibility or mootness, interpreted under Navajo law, were issues not raised in this Court, as evidenced by the issues addressed in these orders. The Court noted the Defendants' pattern of 'recalcitrant attitudes', in the March 1 , 2000 Order page 11, so the fines were issued, particularly where public safety was concerned, to prevent the continued harms enumerated therein.

The object of these injunctive orders, as so stated in the March 1 , 2000 order was "addressed to rectifying the harm done. . . . The Court[ ] wishes to place plaintiffs in nearly as good a position as they would have been without the harm of the defendants and that includes financially." As long as harms enumerated in these two orders are not rectified, under Navajo law, and customs and traditions, these orders are not moot, and this Court for the reasons so stated in the Orders has a duty to enforce them. Pursuant to federal proceedings otherwise pending, this Court has not lifted its stay on proceedings, and the harm done, and upon which adjudication was made, continues unabated to the knowledge of this Court.

Therefore, this Court hereby clarifies that on March 1, 2000 under Navajo customs and traditions, and under Navajo law, and Navajo Nation Court inherent contempt powers, as noted on page 9 of the March 1 , 2000 order, the fines ordered paid to the Court, as enumerated on page 16 of this same order, will be paid formally to this Court's office, for this Court's administration, and will be expended by the Court to 'rectify the harms' and compensate those injured by the Defendants disobedience to these orders. Such Navajo Nation Court administration of payment of fines in behalf of those injured, un de Navajo Nation law, is authorized, by and through, and under the inherent sovereign power of the Navajo Nation.

So signed this 30 day of April, 2003

Judge Raymond Begaye

"I hereby certify that this is a true and correct copy of the instrument on file in the District Court of the Navajo Nation."

Clerk, District Court of the Navajo Nation

EW 61a

Summary
Utah Navajo Health Care Survey
May 8th, 2003

Prepared by
Jane Shelby PhD

Background:

My background includes a doctorate from the University of Utah in Sociology, with focus in Medical Sociology. I am a tenured Associate Professor of Surgery and Adjunct Associate Professor of Sociology at the University of Utah. My career focus has been research, I have published over 100 peer reviewed articles in medical related research, and have graduate level training in statistics, including analysis of survey questions and answers. For several years I have directed a volunteer effort of licensed medical professionals to provide health screening clinics for hypertension, glasses, diabetes, and other diseases in Utah Navajoland, and thus am familiar with the health needs, and culture of the people of this area.

Survey Methods:

The survey was designed, printed and sent to 1,000 households in the eastern portion of the Utah strip of the Navajo reservation, San Juan County, Utah, by Fred Riggs and others in late April, 2003. The survey was completely anonymous with no identifying information of the respondents. Attached to the survey was a stamped envelope addressed to Dr. Jane Shelby who had agreed to receive the surveys, and perform a data summary and analysis of the responses.

The surveys received by Dr. Shelby were numbered, and the responses entered into a Microsoft Excel database. As of May 8, 2003 a total of 238 surveys had been received and recorded. These results presumably come from the English speaking population in the Utah strip of the reservation.

Survey Results:

Question 1. Does San Juan Health District run Montezuma Creek Clink now?

Respondents: 234 22.6% (53) respondents answered yes to this question, 20.5% (48) answered no, and a majority 56.8% (133) did not know if San Juan Health District was the organizational authority currently of the Montezuma Creek Clinic.

Question 2. Did the patient bills from San Juan Health District during 1999 and 2000 make you not want to go to Montezuma Creek Clink for health care?

Respondents: 230 35.7% (82) respondents answered yes to this question, 63% (145) answered no and 1 .3% (3) said they did not know.

Question 3. Do you go to Montezuma Creek Clinic for health care now?

Respondents: 228 The majority of the respondents answered yes to this question, 81.1% (185), while 18.9% (43) said no.

Question 4. Do you go to Monument Valley Clinic for health care now?

Respondents: 220 The majority of the respondents answered no to this question, 93.6% (206), while 5.9% (13) answered yes, and one respondent said they didn't know.

Question 5. Where do you go for regular medical care?

Respondents: 214 The majority of respondents use Montezuma Creek Clinic services for health care, with Shiprock Medical Center listed as the second most frequented facility.

Question 6. Do you believe you have to pay for services at Montezuma Creek Clinic now?

Respondents: 234 20.9% (49) of respondents answered yes to this question, while 77.4% (181) responded no, and 1.7% (4) said they didn't know.

Question 7. Do you believe you have to pay for services at Monument Valley Clink now?

Respondents: 202 The majority of respondents answered no to this question 8 1.7% (165), while 11.4% (23) answered yes, and 6.9% (14) said they didn't know.

Question 8. Do you know of anyone currently not going to Montezuma Creek Clinic or Monument Valley Clinic for health care because they are afraid they have to pay when they go or are afraid they will get billed?

Respondents: 234 Almost a third of the respondents answered yes to this question, 30.3% (71), while 68.4% (160) said no, and 3 (1.3%) replied that they didn't know.

Question 9. What Chapter (referring to Question 8)

Respondents: 57 Aneth and Red Mesa Chapters were the most frequently listed

Chapter Houses, and Mexican Water was also listed several times.

Question 10. Since January 1, 1999, do you know of anyone anxious about patient bills or who thought they had to pay for care at the clinics, who did not go to the clinics for care and later died or became more seriously ill?

Respondents: 227 Of the 227 respondents, 17.2% (39) answered yes to this question, 81.1% (184) answered no and 4 (1.8%) said they did not know.

Question 11. How many? (referring to Question 10)

Respondents: 25 Responses ranged between 1 and 1 00, with most under 10.

Question 12. What Chapter? (referring to Question 10)

Respondents: 30 Red Mesa and Aneth Chapter Houses were mentioned most frequently.

Question 13. What Chapter did this death occur? (referring to Question 10)

Respondents: 21 Red Mesa and Aneth Chapter Houses were mentioned most frequently, with locations of hospitals where the deaths presumably occurred also listed.

Question 14. Are there other people in this chapter still not going to the clinics for care because they think they will receive bills to pay if they go to these clinics?

Respondents:89 Of the 89 respondents, 56.2% (50) indicated yes to this question, while 32.6% (29) said no, and 10 said they didn't know.

Question 15. How many, >20? (referring to Question 14)

Respondents:41 Answers ranged between 1 and 2,000, with 46.3% saying the number was greater than 20.

Question 16. Is there anyone you know of who is not being seen anywhere for medical care due to having no money to pay for care?

Respondents:227 27.8% (63) respondents answered yes to this question, 68.7% (156) said no, and 8 (3.5%) replied they didn't know.

Question 17. About how many? (referring to Question 16)

Respondents:48 Responses ranged between 1 and 1 ,000, with most answers ranging between 1 and 10.

Question 18. What Chapter? (referring to Question 16)

Respondents:46 Red Mesa and Aneth Chapter Houses were mentioned most frequently.

Question 19. Have you received a bad credit rating or been denied credit because of patient billings from San Juan Health Care Services?

Respondents:202 21.8% (44) of respondents answered yes to this question, 77.7% (157) said no, and 1 replied that they didn't know.

Results Discussion:

The response to this survey were varied, and appeared to be an accurate portrayal of the thoughts and experiences of people living in Utah Navajoland. The answers to this survey was not contrived, they were anonymous and the answers were not uniform in any respect that I could readily discern.

There appears to be a significant number of people in Utah Navajoland (80% of respondents) who do not know that San Juan Health District does not operate the Montezuma Creek Clinic. The majority of respondents to this survey currently use the services of this clinic (81.1%), although over a third of the respondents reported that patient bills from the San Juan Health District made them not want to go to the Montezuma Creek Clinic during 1999 and 2000, and 21% still believe you have to pay for services at this clinic. It is concerning that 30.3% of respondents reported knowing someone who was not going to the Montezuma Creek Clinic for fear of having to pay or of the possibility of receiving bills for service. This lingering belief and fear of being billed thus places these people in the position of having to travel longer distances for access to health care, if they have the money and means to travel farther than Montezuma Creek Clinic.

Thirty nine respondents to this survey also reported knowledge of serious health consequences of people whose avoidance of clinics was related to the fear of billing by San Juan Health District. Further, a continuing legacy was revealed by 50 respondents reporting

knowledge of people who currently are not getting care in the local clinics due to fear of billing.

The vulnerability of this population in accessing health care is apparent by the report by 63 respondents who said that they know of people who are not being seen anywhere due to having no money to pay for care. Economic harm from San Juan Health Care Services billing appears to have affected 44 of the respondents in this survey, due to bad or denied credit situations.

Out of 1,000 surveys sent to Utah Navajoland households, almost 25% were returned with responses. This is a good response for such a survey effort, however one may conclude that the majority of respondents are of households with at least one English speaking adult. Households where the Navajo language is predominant or exclusive may not be represented in the responses summarized in this report, and the concern would be that it is the people in these households that are most vulnerable regarding their health status and access to health care. Thus, the apparent ongoing negative impact of large numbers of people who are avoiding seeking health care in the local clinics due to fearful impressions of potential for billing and lack of money may be understated by the results of this survey. The worst cases may not have been captured by this survey, and more effort to quantify and identify people in critical need of health care is warranted.

From the screening clinics that my group has conducted in the Four Corners area of the Navajo Nation since 1999 I have become aware of the myriad of serious barriers to health information and care that the residents of this area face on a historic and current basis. Lack of phones, living from 35 to a hundred miles

from health care facilities, lack of even gravel roads in many cases, lack of transportation or gas, lack of indoor plumbing and electricity, a high percentage of non English speaking people are all barriers that make this population particularly vulnerable to more severe consequences of disease, and if they believe they have to pay for care, they are burdened even further.

This population faces challenges in daily living due to poverty and isolation that are far beyond those of most people in the United States, with the highest rates of death in America for several categories of disease and accidental causes. During our screening health clinics held twice yearly for the past 3 years, we would diagnosed 6- 10 potential new cases of diabetes, and similar numbers of high blood pressure during two days of clinics with approximately 300-500 visitors total in just two days. The clinic visitors expressed gratitude for the clinics and availability of health information and advise, telling us that access to health care was difficult. This vulnerable population faces many challenges in terms of access to health care at all stages of life, and the results of this survey indicate that they may continue to pay the price for any additional barriers to health care with increased severity of illness and premature deaths.

CONCLUSION

The survey responses by a large percentage of respondents indicate there were there detrimental health consequences to people due to the billing practices of San Juan Health District during the 1 1999-2000 time period. If the percentages of the respondents are continued through the general population, the survey demonstrates that this legacy appears to continue today with many people, realistically possibly hundreds if not over a thousand, not receiving any

health care due to residual fears of economic harm and lack of resources, both monetary and informational.

The foregoing information, is true to the best of my information and belief. So Signed this 9th day of May, 2003

Dr. Jane Shelby, Ph. D.

Notary Certification

County of Salt Lake State of Utah

I, (notary public) did witness Dr. Jane Shelby, appearing before me with a picture Identification, swear to me that the foregoing is true to the best of her belief and knowledge, and signed the foregoing document in my presence.

(Notary Public)
My Commission expires 1-1-05 day of 9th, 2003

Notary Public
Shaleen W. Watkins
615 Arapeen Dr., Ste 110
Salt Lake City, Utah 84108
My Commission Expires
January 1, 2005
STATE OF UTAH

EW 70a

SR-CV-162-99-CV

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK

DONNA SINGER; Fred Riggs C# 18576;
Alison Dickson C# 212,765;
Plaintiffs,

vs.

SAN JUAN COUNTY; San Juan Health Services District; Rick Bailey, Reid Wood, Mary Nielsen, Lauren Shafer, Commissioner Bill Redd; Commissioner J. Tyron Lewis; Roger Atcitty; Atcitty; John Lewis; Mark Maryboy fn1; Craig Halls; Patsy Shumway fn2; Karen Adams and other John and Jane Does as yet unnamed In their personal and official capacities
Defendants,

Application for Preliminary Injunctive
and Temporary Relief (Rule 65)

NOW COMES Donna Singer (Mrs. Singer); Fred Riggs. Census No. 18576 (Mr. Riggs); and Alison Dickson, Census No. 212765 (Mr. Dickson), by and through their undersigned counsel, and having filed prior hereto their complaint for- damages, herein respectfully make application to the District Court for Injunctive and Temporary Relief pursuant to Rule 65, of the Navajo Nation Rules of Civil Procedure as follows:

JURISDICTION

1) That the plaintiffs, and each of them, are or were employed by the San Juan Health Services District at the Montezuma Creek Health Clinic located exclusively

within the territorial jurisdiction of the Navajo Nation at or near Montezuma Creek, Navajo Nation (Utah); and,

2) That the defendants, and each of them, conducted a for profit enterprise at the Montezuma Creek Health Clinic located exclusively within the territorial jurisdiction of the Navajo Nation at or near Montezuma Creek, Navajo Nation (Utah), under contractual relations with the Utah Navajo Trust Fund, and the Indian Health Service, to provide necessary health and medical services to residents of the Navajo Nation residing within the Utah Strip of the Navajo Nation; and,

3) That this Court has jurisdiction over the parties and subject matters herein pursuant to the 7 NNC 253, and 7 NNC 254 and 7 NNC 256; and,

PARTIES

4) That the plaintiffs herein have filed their complaint for damages against the defendants, individually and collectively, in each of their official and private capacities (with the exception of Mark Maryboy and Patsy Shumway who are held in suit only in their official capacity) express and implied, at the time the claims arise herein, until now, in the following particulars

a. San Juan County as the governing authority over San Juan Health Service District; and,

b. San Juan Health Service District (SJHSD) as the empoyer of the Plaintiffs and San Juan County's alter ego; and,

c. Commissioner Bill Redd, a San Juan County Commissioner and SJHSD Trustee and Administrative Board Member; and,

d. Commissioner J. Tyron Lewis a San Juan County Commissioner and SJHSD Trustee and Administrative Board Member; and,

e. Commissioner Mark Maryboy, a San Juan County Commissioner and SJHSD Trustee and Administrative Board Member (in his official capacities only); and,

f Rick Bailey (NB. Bailey), San Juan County Administrative Aide, and SJHSD interim Executive Director and CEO; and,

g. Reid Wood (Mr. Wood), SJHSD interim CEO, and now permanent SJHSD CEO; and,

h. Mary Nielsen (Mrs. Nielsen) SJHSD Chief Financial Officer; and,

i. Lauren Shafer (Mrs. Shafer) Patient Services Director; and,

j. Roger Atcitty (Mr. Atcitty), Chairman of the SJHSD Administrative Control Board; and,

k. Karen Adams (Mrs. Adams) a SJHSD Administrative Control Board Member; and,

l. John Lewis (Mr. Lewis) a SJHSD Administrative Control Board member; and,

m. Patsy Shumway (in her official capacity only), a SJHSD Administrative Control Board member; and,

n San Juan County Attorney Craig Halls (Mr. Halls); and,

o. Other John and Jane Does as yet unnamed, in their personal and official capacities (with the exceptions of Mark Maryboy and Patsy Shumway who are held responsible in only their official capacities. express and implied) with violations of the Plaintiffs, and each of the Plaintiffs, rights and claims under the Navajo Bill of Rights; Navajo Nation Code (NNC); Navajo customs and traditions among other sources of law; the Navajo Preference in Employment Act (NPEA); as better and further demonstrated in the attached Navajo District Court Complaint for Damages and Office of Navajo Labor Commission complaint and request for Preliminary Relief, and other pleadings, documents and exhibits thereto and herein.

5) That the plaintiffs seek immediate injunctive and temporary relief for violation of their Navajo Nation Civil Rights, common law torts, and other legal claims as are better enumerated below, du to the irreparable harm that has occurred and is occurring to the plaintiff and the communities of the Navajo Nation, Red Mesa and Aneth Chapters, as plaintiffs allege in the following:

IRREPARABLE HARM

6) That the plaintiffs have exhausted all viable and reasonable administrative remedies available to them consistent with the applicable Personnel Polices and Procedures of the San Juan Health Service District.

a. That future SJHSD administrative remedies are denied as the administrator the plaintiffs are grieving is now the equivalent of the Executive Director, and there

are no applicable policies for further grieving to the Executive Director; and,

b. That any grievance panel consisting of board members and the Executive Director is inherently flawed and tainted; and,

a. That plaintiffs have filed individual grievances for their labor claims with the Office of Navajo Labor Relations and the Navajo Nation Labor Commission, which are currently under investigation; and,

d. The plaintiffs seek protection of their civil rights which have been irreparably harmed; and,

e. Which will continue with out the benefit of interim rebel from this Court.

DUE PROCESS CLAIMS

7) That the San Juan Health Service District has denied Mrs. Singer and Mr. Riggs, and Mr. Dickson of their due process rights by acting in a manner that is contrary to the applicable Personnel Policies and Procedures of the San Juan Health Services District; the Navajo Preference in Employment Act; the Navajo Bill of Rights; and the applicable Utah Merit System act of the State of Utah,

Mrs. Singer and Mr. Riggs

a) By denying their right to a pre-discharge and pre-disciplinary hearing with their supervisor; and,

b) By denying their right to be confronted by their accusers; and,

c) By denying their right to present evidence and compulsory witnesses on their own behalf, and,

d) By denying their right to know ahead of time what evidence and witnesses will confront them; and,

e) By denying their right to have a fair and impartial hearing officer decide the matter of the allegations made against them; and,

f) By denying their right to have a clear and unequivocal statement of the charges upon which Mrs. Singer's discharge and Mr. Riggs' discipline and RIF is based; and,

g) By denying their right to a clearly enumerated list of evidence upon which the discharge and discipline and failure to reinstate them whole are based; and,

h) By denying their right to a hearing panel that is not inherently structurally flawed nor tainted; and,

i) By denying their right to a timely hearing and timely decision; and,

j) By denying their right to a decision with clearly stated facts and conclusions of law; and,

k) By denying their right to have the burden of proof of their 'fraud' allegation rest with the accuser, rather than San Juan Health Services District placing the burden of proving their innocence upon them; and,

l) By denying their right to have and expect employment policies to be carried out in an impartial and uniform manner throughout the employees of the San Juan Health Services District; and,

Mr. Dickson

m) By denying Mr. Dickson's right to any type of a fair and impartial hearing to be given his permanent full time status, as evidenced by all the above violations by the defendants and Mr. Wood's statement referencing that since no action was taken, there was none to grieve; and,

n) By denying Mr. Dickson right to any type of impartial hearing officer, as the person denying him his permanent status is now the CEO of San Juan Health Services District; and,

EQUAL PROTECTION CLAIMS

8) That the San Juan Health Service District has denied Mrs. Singer: Mr. Riggs and Mr. Dickson of their equal protection rights by the San Juan Health Service District by treating the plaintiffs, and each of them, as the staff and employees of the Montezuma Creek Health Clinic, differently, uniquely, and unequally, in a racial and otherwise discriminatory fashion as distinquishable from the remainder of the staff and employees of the San Juan Health Service District with the only known distinction being their associations by blood and linage to the Navajo Tribe of Indians and as Native Americans, a protected political class, as set out in the foregoing, and as further set out in the complaints to the Navajo Nation Labor Relations office; Navajo Nation Labor Commission, and the underlying Court complaint herein, contrary to the applicable Personnel Policies and Procedures of the San Juan Health Services District; the Navajo Preference in Employment Act; the Navajo Bill of Rights; and the applicable Utah Special District Personnel Management Act of the State of Utah, and in violation of the San Juan Health Service District's

fiduciary responsibilities under is agreements with the Utah Navajo Trust Funds and the Indian Health Service contracts upon which the Montezuma Creek Health Clinic relies; and,

DENIALS OF THE RIGHTS OF FREE SPEECH AND ASSEMBLY

9) That the San Juan Health Service District has denied Mrs. Singer; Mr. Riggs and Mr. Dickson their rights of free speech and assembly:

a) That Mrs. Singer did speak out at board meetings about ambiguous budget expenses being placed upon Montezuma Creek Health Clinic, and,

b) That Mrs. Singer did speak out as a private citizen in support of a private hospital coming into Blanding, Utah that would take some business from Monticello' s hospital, but improve health for the people in the south part of San Juan County; and;

c) That because Mrs. Singer did speak out at board meetings she has been called 'insubordinate' and 'intrusive' and 'probing' and in places where she shouldn't have been; and,

d) That she has been labeled as 'evil' and 'enemy to the hospital' and 'cancerous' and a 'liar and a cheat' for a four hour time card error, wherein in fact someone unknown to Mrs. Singer clocked in on her card on November 13, 1998 when she was not in Montezuma Creek that morning; and,

e) That she has been charged with 'time card fraud'; and,

f) That no evidence supports this charge; and,

g) That Mrs. Singer has no evidence in her entire nearly 18 year personnel file of any dishonesty at any time until the allegation of December 1, 1999; and,

h) That the said discharge occurred within approximately two weeks of Mrs. Singer speaking out at the November SJHSD public board meeting; and,

i) According to San Juan Health Service District's Personnel Policy and Procedures, Mrs. Singer was discharged for time card problems that were unnecessary because she was Fair Standards Labor Act(FSLA) exempt; and,

j) Mr. Riggs charged Mr. Wood with discrimination; and,

k) Mr. Wood withdrew a promotion he had offered Mr. Riggs a few days before; and

l) Mr. Wood has admitted on February 12, 1999 that he withdrew Mr. Riggs promotion because Mr. Riggs by using his right to speak, charged Mr. Wood with discrimination; and,

m) Mr. Wood later misrepresented to Mr. Bailey that Mr. Riggs had received a verbal warning documented to his file, when in fact Mr. Wood had taken Mr. Riggs through every step of discipline, but for termination, for his first time card error in 23 years; and,

n) Mr. Riggs was FLSA exempt; and,

o) Mr. Riggs had never been given training on time cards; and,

Mr. Dickson

p) Mr. Dickson signed an affidavit documenting the January 5, 1999 racially insensitive and derogatory statements by Mr. Wood and Mrs. Nielsen; and,

q) They have denied him Mr. Dickson's right to be considered a permanent full time employee, though he has worked the commensurate hours and received an excellent evaluation; and,

r) They have labeled Mr. Dickson as insubordinate and rebellious because Mary Nielsen 'doesn't like her words used back against her' because it 'makes her mad'; and

s) Mr. Dickson has had his job threatened first for asking to be given his permanent status and secondly by having his position moved to Monticello; and,

DEFAMATION

10) That the San Juan Health Service District has defamed Mrs. Singer; Mr. Riggs and Mr. Dickson intentionally, falsely, and wrongfully, and have committed tortious interference with future employment contractual relations of Mrs. Singer; Mr. Riggs and Mr. Dickson:

a) Mrs. Singer and Mr. Riggs have been charged with fraud, that as part of their personnel file prevents them from looking for a new job due to the accompanying necessity of further defaming themselves by having to explain this charge; and,

b) Fraud is a charge that will cause harm per se; and,

c) Mrs. Singer has been labeled as an 'enemy' 'liar and cheat' 'cancerous' 'evil' among the administrators and supervisory staff and San Juan Health Service District Board; and,

d) Public Health employers review prospective employees files and so the fraud charges for Mrs. Singer and Mr. Riggs will inevitably ruin their careers and limit Mr. Dickson's; and,

e) Mr. Dickson is being labeled a 'temporary' or 'part time' person, thus limiting his opportunity to obtain a job that may require that he have worked as a permanent 'full time' employee; and,

f) Mr. Dickson is one of the billing clerks at Montezuma Creek Health Clinic that has been labeled 'insubordinate' and 'rebellious' which was published in the paper and on the radio for the cause of exercising their free speech; and,

THEFT

11) That the San Juan Health Service District has committed theft in the wrongful and malicious taking of the words and reputations of the plaintiffs Mrs. Singer; Mr. Riggs, and Mr. Dickson; and,

12) That Mr. Wood has admitted that there was a serious time card problem in the system and that it had to stop; and,

13) That Mr. Wood told other Montezuma Creek Health Clinic staff members not to speak to Mrs. Singer

and Mr. Riggs when they were given the 'fraud' charge and placed on paid administrative leave; and,

14) That defendants seriously and intentionally injured Mr. Riggs and Mrs. Singer's reputation, and future employment possibilities, for the public purpose of making them examples for the public purpose of stopping time card problems and stopping people from informing the SJHSD board, public and others of the defendants' wrongful acts and attitudes and,

15) That the damage is ongoing, serious and substantial, and the only way for the plaintiffs to be free of this charge is if this court grants relief as quickly as possible from the repercussions of these foundationless and scourilous charges by having the defendants remove them from their files, or have their files placed in the privacy of the Office of Navajo Labor Relations; and,

CONSPIRACY

16) That the San Juan Health Services District defendants have conspired within and without itself to deprive Mrs. Singer; Mr. Riggs and Mr. Dickson with their lawful rights and entitlements by acting in concert to discharge, and discipline, and not give Mr. Dickson his permanent full time status; and

17) That Mrs. Nielsen and Mr. Wood conspired to deprive the Navajo people of their pre paid health care entitlement with the 'CIB policy' that if carried out may lead to someone's death or other catastrophy; and,

INTERFERENCE PUBLIC POLICIES OF THE NAVAJO NATION

18) That the actions of the San Juan Health Service District have substantially damaged and impaired the ability of the Montezuma Creek Health Clinic to provide proper services to the local communities of the Navajo Nation and in the rights of the Navajo Nation to enact its own laws and the Navajo people and others to be protected and controlled by them within the territorial jurisdiction of the Navajo Nation:

LIKLIHOOD OF SUCCESS ON THE MERITS

19) That Plaintiffs will likely succeed on the merits of their respective claims due to:

a) Lack of any prior warning letters or progressive discipline prior to Mrs. Singer's and Mr. Riggs discipline; and,

b) Lack of any equal treatment of the plaintiffs with other San Juan Health Service District employees; and,

c) Lack of any uniformity of discipline through out the, San Juan Health Service District; and,

d) Lack of defendants' acknowledgement of, and compliance with Navajo, federal and state statutes and regulations that mandamously govern it, and

e) The malicious abuse of discretion, arbitrary and capricious willingness of defendants to destroy the future ability of plaintiffs to seek life, liberty and the pursuit of happiness; and.

f.) The viscious manner in which defendants have intentionally and negligently inflicted emotional distress upon the plaintiffs and other employees of Montezuma Creek Health Clinic.

LACK OF AN ADEQUATE REMEDY AT LAW

20) Plaintiffs can not wait for a trial to obtain an adequate remedy for their civil rights violations or the harm being done to the community because as time passes, the seriousness of the patient services and employment problems is increasing; and,

21) That, the defendants, not fearing any short term repercussions, are likely to harm other people within the SJHSD system; and,

22) That traditionally the Courts have found that injunctive relief is the remedy best suited for civil rights violations that are priceless, inherent, and undeniable.

PRAYER FOR RELIEF

The plaintiffs pray for injunctive and temporary relief, and any other relief including RESTRAINING ORDERS as the Court sees fit, and until the proceedings of this Court are finished against San Juan. County et al, defendants, collectively and individually, and in their official and private capacities, and with San Juan Health Service District, at all times herein, being the alter ego of San Juan County and encompassing all other defendants, to protect plaintiffs

1. From continued violation of plaintiffs' and Navajo Nation tribal members fundamental rights as enumerated above and throughout this action, as contained or referenced, in the plaintiffs Initial Complaint, and Application for Injunctive and Temporary Relief; the Memorandum of Law and the attached Plaintiffs exhibits, ONLR complaints and Labor Commission pleadings.; and,

2. From further interference with Mrs. Singer's ability to manage Montezuma Creek Health Clinic; and, until such time a final judgment is issued in this case and in accordance with the announced directives of the Aneth and Red Mesa Chapter's resolutions to the Utah Navajo Commission and San Juan Health Service District; and,

3. From interacting with all plaintiffs and Montezuma Creek Health Clinic personnel and patients in any manner other than a manner that bespeaks equality, fairness, respect and dignity that is fundamental to all human beings; and,

4. That all of Mrs. Singer's back pay and benefits be reinstated from the date of discharge until the present and forward; and,

5. That Mrs. Singer will no longer report directly to the enumerated defendants about the operation of Montezuma Creek Health Clinic; and,

6. That Mr. Riggs be reinstated to his previous position with back pay and benefits from the date of his alleged RIF and forward; and,

7. That Mr. Dickson is to be immediately given his permanent full time status at 40 hours a week with back pay and benefits to the time he finished working 520 'non-temporary' hours; and,

8. That Mr. Riggs' and Mrs. Singer's files be expunged of all records of allegations of 'fraud'; 'misconduct', and 'violations', and,

9. That any new employees defendants' have hired, ultra vires inconsistent with the NPEA, and other Navajo

law, and Utah merit system principals consistent with Navajo Law, be declared by this Court as null and void for any employment purposes at Montezuma Creek Health Clinic; and,

10. That the defendants pay all the plaintiffs' attorneys fees and legal costs, within 5 working days, by Cashier's check, at the same rate of pay as SJHSD contracted to pay Ms. Karra Porter, Esq., in addition to other counsel, as cumulatively totaled per hour.

A SPECIAL MASTER

11. That, under Navajo Nation Rules of Civil Procedure Rule 53, a SPECIAL MASTER, be appointed and will be endowed as an officer of this Court with all the necessary powers and authorities, including the discretionary authority to direct the Navajo Nation Police, in their tribal and federal capacities, to assist in carrying out the following Court directives with the following enumerated powers, duties and authorities;

The SPECIAL MASTER:

a) Will report directly to the Court at least once every two weeks on the welfare of Montezuma Creek Health Clinic, and,

b) Will supervise the execution of any and all Navajo Nation District Court orders, ONLR or Labor Commission orders; and,

c) Will report once a week, to a person the defendant's may appoint to receive the Montezuma Creek Health Clinic management report- other than Mr. Wood, Mrs. Nielsen, or Mrs. Shafer; and,

d) Will receive Mrs. Singer's management report describing the activities occurring at Montezuma Creek Health Clinic; and,

e) Will protect all Montezuma Creek Health Clinic personnel and patients from being abused (verbally, physically, emotionally, or mentally) by the defendants; and,

f) Will prevent the movement of any employment positions out of Montezuma Creek Health Clinic, unless it is in the very best interest of the Navajo Nation citizens health and general welfare; and,

g) Will assure that the billing records, and all other financial records at Montezuma Creek Health Clinic will not be moved from the clinic property, altered, or tampered with in any way and will be secure upon the premises of Montezuma Creek Health Clinic, and,

h) Will assure that reproductions of said financial records can be made, in the presence of, and under the direction and supervision of the Montezuma Creek Health Clinic staff for purposes of all parties involved provided that the defendants, with the exception of Mr. Maryboy and Mrs. Shumway, are not to enter onto the Montezuma Creek Health Clinic property without the SPECIAL MASTER'S express approval; and,

i) Will if appropriate in the SPECIAL MASTER'S best judgement seek assistance for the Navajo Nation Legislative Auditor's office with a request to audit the Utah Navajo Trust Fund and SJHSD financial records; and,

j) Will assure that no patients of Montezuma Creek Health Clinic are turned away due to lack of their 42

C.F.R. 63.16 Beneficiary Identification Card, if they are otherwise eligible for treatment; and,

k) Will instruct the Navajo Nation Police, acting in their local and federal authority:

1. To immediately collect and copy, on the SJHSD premises, all the SJHSD item by item expense records, bank records of deposit and withdrawals, and records of cash collections, for the past five years; and,

2. To immediately collect and copy the patient account records of Monticello Hospital for the last two years; and,

3. To take said financial records for safekeeping to the ONLR office in Shiprock, Navajo Nation (NM); and,

4. To go to the Utah Navajo Trust Fund office in Blanding, Utah, and copy all the bank records and other records of withdrawals and deposits, from 1993 forward until the current date, and remain on the premises until the copying is complete; and,

5. To collect plaintiff's personnel and financial time card files from the San Juan Health Service District in Monticello, Utah, and deliver the said file to the Office of Navajo Labor Relations in Shiprock for reproduction, protection and preservation pending further Court proceedings, and the Office of Navajo Labor Relations and the Navajo Nation Labor Commission proceedings; and,

a. That defendants will have access to said copies for their own reproductions; and,

6. To enter onto the Monument Valley premises and collect and destroy all 'CIB policy' signs; and,

l) That the SPECIAL MASTER will have complete authority to enforce any order he issues acting in the best interest of Montezuma Creek Health Clinic with Navajo Nation Police within their tribal and federal authority; if necessary; and,

m) That the cost of the SPECIAL MASTER'S salary, as designated by the Court, and the costs accrued for the designated audits of records, and other actions ordered by the SPECIAL MASTER shall be paid by the defendant's as is considered reasonable by this Court in accordance with Navajo Rule of Civil procedure 53; and,

n) That if the cost of the SPECIAL MASTER is not paid within 30 days of request, then the Court may have to attach those moneys that are designated to go to the trust fund that the County eventually obtains from mineral and oil rights in the Utah Strip; and,

o) That Mrs. Singer will be give great latitude and cooperation by the SPECIAL MASTER, to carry our her duties in the best interest of Montezuma Creek Health Clinic and the neighboring communities; and,

12. That pending an exclusionary hearing, (within this Court's jurisdiction under 17 NNC §§ 1901, and 1902 and the Navajo Nation's undiminished inherent sovereign powers under the Treaty of 1868), Mr. Wood, Mrs. Nielsen, and Mrs. Shafer, be RESTRAINED from entering, and ORDERED NOT TO ENTER, (except for the very limited and specific purpose of attending the Navajo Nation Court and Labor proceedings involved in this case), onto and within the Navajo Nation's territorial boundaries due to the defendant's

(1) endangering the public's health and safety through the implementation of the illegal CIB policy within Navajo Nation boundaries; and,

(2) irreparably injuring plaintiffs' rights; and,

(3) stealing plaintiffs speech and reputations without just compensation; and,

(4) attempting to deny the plaintiffs further due process by threatening witnesses with removal of their employment positions; and,

(5) having discriminatory attitudes toward the Navajo people and people of color; and,

(6) violation of the defendants' fiduciary duties under their Utah Navajo Trust Fund agreement and the Indian Health Service contracts; and,

13. That, the defendants be immediately ordered to decease and desist from turning away any otherwise eligible Indian patient, pursuant to 42 CFR § 36.16, away from defendant's health care facilities; and,

14. That defendant's be restrained from continuing to violate Navajo and Utah codes, and immediately inform all employees and patients of their Navajo legal rights and protections, Indian Health Service, Medicaid, and Medicare rights and protections, and their merit system rights and protections under NPEA and the Utah Code 17A-§§ 601-603 by posting signs written in English, Ute, and Navajo, in all facilities within the next 24 hours.

Based on the foregoing, Plaintiffs pray for immediate Preliminary Injunctive relief, pending further proceedings of the Court, and all other relief as the

Court deems appropriate for the Plaintiffs, and restitution of their civil-rights.

So signed and date this 8th day of April 1999.

Wm. P. Battles Esq.
Wm. P. Battles and Associates
Post Office Drawer 460
Window Rock, Navajo Nation (AZ) 86515
(520)-871-2525/2527

Susan K. Schildmeyer Utah liar No. 1985
8950S. Sandia Hills Dr. Suite 2156
Sandy, Utah 84094
(801)-256-9477
Counsel for the Plaintiffs

Footnotes

Fn1 Mr. Maryboy is sued in his OFFICIAL capacity express and implied, only.

Fn2 Mrs. Shumway is sued in her OFFICIAL capacity, express and implied, only.

EW 91a

Case No. 2:00CV584

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DISTRICT

DR. STEVEN MACARTHUR et al.,
Plaintiffs,

vs.

SAM JUAN COUNTY et al.,
Defendants.

Salt Lake City, Utah
Date: November 15, 2002
Time 10:30 a.m.

(Court's ruling)

REPORTER' S TRANSCRIPT
BEFORE: THE HONORABLE BRUCE S. JENKINS

APPEARANCES OF COUNSEL:

For the Plaintiffs: SUSAN ROSE, ESQ.

For the Defendants: CAROLYN COX, ESQ. ROBERT HARRISON, ESQ., and CHRISTINE GREENWOOD, ESQ.

Court Reporter: REEVE M. BUTLER
Official Court Reporter, RPR
Rm. 467 Federal Bldg.
350 S. Main Street
Salt Lake City, Utah 84101
Tel. 328-0837

THE COURT: Okay. Thank you. Appreciate your help. Let me look at these 3 cases we've got waiting in the wings. From what you folks told me yesterday the fallout from whatever the Tenth Circuit did with Judge Kimball's opinion you indicated that they denied a petition for en banc or a reconsideration so I assume that we'll be receiving a mandate from the Tenth, well at their leisure but sometime when it comes so anticipating that that will be here in a couple of weeks why don't we give you a date where we can discuss that particular matter and schedule what needs to be done if anything in reference to that.

Let's take a chance on the fact that it will be here before the 4th of December and why don't we just simply set it down for status and scheduling at 1:20 on the 4th of December. I would suggest that between now and then you might put in written form what you think we need to do or supposed to do.

MS. COX: With that portion of the case Judge or with these items?

THE COURT: That portion of the case.

MS. HARRISON: Excuse me Your Honor I am out of town on the 4th of December.

THE COURT: Okay.

MS. HARRISON: Is there another date that might be convenient with the court?

THE COURT: Sailing in the Caribbean?

MR. HARRISON: If only Your Honor, if only.

THE COURT: When are you back?

MS. HARRISON: It's just that day Your Honor. THE COURT: Okay.

MS. COX: Your Honor, if it comes back it will also involve the schedule of Jesse Trentadue who represented –

THE COURT: That's his problem.

MS. COX: Okay.

THE COURT: This is status and scheduling. Well why don't we make it easy, why don't we say 10 minutes to 12 on Friday the 6th.

MS. COX: Your Honor, I apologize, but right now I have a deposition scheduled for that day.

THE COURT: All day?

MS. COX: Uh, currently

THE COURT: When do you start?

MS. COX: Probably 9 or 9:30, probably 9 o'clock.

THE COURT: Okay. And then when do you break?

MS. COX: I mean I could break if we're not going to be real long. We just have 2 depos scheduled.

THE COURT: Status and scheduling, 10 to 12, we're not going to be here very long.

MS. COX: Okay. Then that will work.

THE COURT: Okay. You can alert Mr. Trentadue as to that too if you'll be kind enough to do that and I should indicate that I'd be interested in having something in writing from the parties on an individual basis, not on a responsive basis, just on an individual basis say by Monday the, or I'm sorry, say by Tuesday the 3rd as to what you think the Circuit's told us what to do, what needs to be done. Counselor, you wanted to say something.

MS. ROSE: Uh, I just had a question and I was wondering if ultimately you're going to want to have memorandums filed on the question of subject matter jurisdiction of the Navaho court?

THE COURT: Well what I'm interested in having you tell me in the writings that I've suggested I'm interested in having you tell me your interpretation of what it is that the circuit says has to be done.

MS. ROSE: Does the winner get a $1,000?

THE COURT: Whatever it is, whatever it is. I frankly haven't studied their opinion and the brief scanning that I did it appeared that the question was a very limited question and I'm interested simply in your versions as what needs to be done and so we can agree on what needs to be done if anything.

Now let me, let me turn to the matters that we've been discussing, the 3 remaining claims, and let me make some comments to begin with. In my opinion one of the difficulties with this particular lawsuit is the fact that we've had a potpourri of plaintiffs each with possible and plausible individual claims that have been grouped in one lawsuit, for whatever purpose I don't know.

It may have been an easy way of simply saving on filing fees but we've endeavored as best we can in dealing with the specific claims over the months that we've dealt with in this particular matter to try to isolate what causes of action individual plaintiffs may have and to see if there is a plausible basis enough there either on an evidentary footing or on a legal proposition footing enough there to go beyond what we've been dealing with in our endeavor to isolate questions and ascertain whether or not there's a legal question or a factual question bearing on a legal question that we can be helpful on.

We've endeavored to allow people to make their record as to factual scenario though each of the 3 plaintiffs their unconnectedness is demonstrated by the fact that though they may have common defendants, causes of actions are different but at any rate Dr. MacArthur. As I understand Dr. MacArthur he had a temporary appointment, the temporary appointment expired.

During his temporary appointment or the granting of privileges to work in district facilities he may have had an unhappy experience but at any rate his temporary appointment expired it was extinguished, his status was tabled. Dr. MacArthur for whatever reason or for whatever motivation made no further application and elected to set up shop in Ely where apparently conditions for him were more compatible. Is there a due process violation, there is not.

Dr. MacArthur wasn't terminated. His privilege was expired. There was no effort on his part to extend it or to renew it, he simply left. Now he may have been motivated by unhappy personal relationships with a multitude of people but he left. There was no request for a hearing, there was no effort to extend the application

of privileges, application for extended privileges I should say, there was no violation.

One does not have to take Dr. MacArthur by the hand and tell him anything. He's a big boy, he's a doctor, he's looking for a compatible place to practice, he apparently found one. His complaint is dismissed.

Ms. Lyman, Michelle Lyman, perhaps a more interesting scenario. A woman of some accomplishment it would appear from the proffers that have been made. A woman apparently with a good heart and a sympathetic ear and a sense of compassion for those who are in need of health care.

Her status is defined by law and her status is a dependent status. Her status is dependent upon an overseeing for want of a better word of a medical doctor. It's a device for extending the doctor's reach, not for extending the medical assistant's reach, and though her limitations are directly related to the status of her overseeing physician her status is dependent upon the existence of an overseeing physician.

She went through a transition time where she undoubtedly did lots of good for lots of people in her extended capacity but as I view the proffer that has been made it would appear to me that she simply endured a subordinate status dependent upon the status of the overseeing physician and even though she may have been treated to unkind comments or even mistaken observations by, on staff people and the unholy experience of those of us who deal eternally with the bureaucrats of the world, the loss of documents that she knows that she has submitted, the practical problem is well how do you correct something like that and do you actually have to have those to achieve the status

she's ordinarily entitled to when she has a sponsoring or a supervising physician.

And it would appear to me that the application process is her responsibility and even though in her own mind she may think that there is some kind of inappropriate action on the part of custodians of material that she knows for sure she submitted we all go through the problem, the process of doing it twice and sometimes more than that to achieve the status that we want to achieve.

Looking at the material that's been furnished and proffered it would seem to me that search as I may try to be of assistance but under the factual scenario presented, the legal propositions presented I can't find a cause of action and thus it seems to me I must under those circumstances dismiss the action.

We've talked about Ms. Valdez not just today and yesterday and on other occasions in some detail. We talked previously about the fact that Ms. Valdez is Caucasian, she's not Hispanic herself, she's married to a Hispanic and we've dealt or conversed about that on prior occasions and the question is under the circumstances taking the evidence in the light most favorable to Ms. Valdez at best we've got here somebody calling, asking for the doctor, when he's going to be there and a suggestion by her sister-in-law after Ms. Valdez had visited the restroom a couple of times that she had been instructed and informed that the doctor was to be at his clinic at 9 and go to the clinic.

She and her sister-in-law left. They didn't go to the clinic, they went home. Three days later she saw Dr. Redd. Dr. Redd treated her and then subsequently she

ended up getting some relief at the University of Utah Hospital.

Looking at the statutes referred to and particularly the suggestion that implicit that the complaint ought to conform with what is said to be the evidence, namely that she went to an emergency room and wasn't treated, I think under the factual scenario presented that that is insufficient to justify referring the matter to a fact-finder and under the circumstances that cause of action as alleged and as proffered should also be dismissed and I will so order.

I've tried to deal with this matter over an extended period of time. We started up yesterday, continued the matter and after hearing the matter for roughly a couple of hours yesterday, started a little late other than the calendar, hearing the matter today from about quarter to 11 until a little afternoon, starting again this afternoon a little after 2 and continuing until now for the purpose of giving counsel the benefit of the record so that the court can understand the allegations made.

As I observed earlier one of the problems with this case I may have observed in the same fashion earlier is the well intention I think but perhaps strategically mistaken effort to bunch a number of unrelated plaintiffs against some common defendants.

The effort is again to sort out as best we can what the contentions are and the footings for those contentions and resulting in the orders that the court has indicated. I'll ask counsel for defendants to prepare and submit appropriate orders memorializing what we've done in reference to the 3 that we've had left here. I fixed a date

to deal with whatever the Court of Appeals has done and let's go home. We'll be in recess.

MR. HARRISON: Thank you.

MS. COX: Thank you, Your Honor.

THE COURT: Okay.

MS. ROSE: May I ask a question Judge, since this would probably be the final order for these plaintiffs –

THE COURT: That's correct.

MS.ROSE: – would it be possible to get a Rule order signed?

THE COURT: Well I think the easy way here is for us to finish up the work that we need to finish up on the other matter and then let it all go if it's going to go. That won't take very long. Let's see what we can do.

MS. COX: Thank you, Your Honor.

THE COURT : Okay.

MS. ROSE: May I ask one more question procedurally?

THE COURT: Sure.

MS. ROSE: I've put in a motion to amend the complaint and I drafted it in 2 parts. Since these plaintiffs have been dismissed is there any way of procedurally just looking at amending the complaint for the second part?

THE COURT: Well I dealt with the important aspect of the amended complaint, namely the emergency room problem and I've dealt with that and I'll simply deny the motion to amend.

MS. ROSE: No, no I meant no, Your Honor, I'm sorry, I didn't mean for these 3 plaintiffs that have been dismissed, I understand that they are gone. What I'm talking about is I amended the complaint that I originally filed for Singer, Riggs and Dickson and is that motion for amending that part of the complaint still viable?

THE COURT: No, the motion is denied.

MS. COX: Do you want me to include that in the other order Judge?

THE COURT: As a separate order.

MS. COX: Okay.

MS. ROSE: One more question please.

THE COURT: Okay. Fine.

MS. ROSE: I'm anticipating a motion for attorney's fees here. Is there any, is the court persuaded any way in terms of my client's liabilities for payment of the opposing attorney's fees?

THE COURT: I wouldn't anticipate trouble. I'd wait for events to unfold, you know. I can't make a ruling on nothing, on something that hasn't been filed and may never be filed.

MS. ROSE: Okay.

THE COURT: Okay. Thank's a lot.

MS. COX: Thank you, Judge. (Excerpt concluded)

REPORTER ' S CERTIFICATE

STATE OF UTAH

COUNTY OF SALT LAKE

I, REEVE M. BUTLER, do hereby certify that I am an Official Court Reporter for the United States District Court for the District of Utah;

That as such Reporter I attended the hearing of the foregoing matter on and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages numbered from 2 to 12 constitute a full, true and correct report of the same.

DATED at Salt Lake City, Utah, this 6th day of February, 2002.

REEVE M. BUTLER, RPR

EW 102a

Case No. 2:00CV584

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DISTRICT

DR. STEVEN MACARTHUR et al.,
Plaintiffs,

vs.

SAM JUAN COUNTY et al.,
Defendants.

Salt Lake City, Utah
Date: January 7, 2003
Time 10:30 a.m.

REPORTER'S TRANSCRIPT
BEFORE: THE HONORABLE BRUCE S. JENKINS

APPEARANCES OF COUNSEL:

For the Plaintiffs: SUSAN ROSE, ESQ.

For the Defendants: CAROLYN COX, ESQ. ROBERT HARRISON, ESQ., and JESSE TRENTADUE, ESQ.

Court Reporter: REEVE M. BUTLER
Official Court Reporter, RPR
Rm. 467 Federal Bldg.
350 S. Main Street
Salt Lake City, Utah 84101
Tel. 328-0837

THE COURT: And let's, let's turn briefly to MacArthur and others verses San Juan County and others. It's here for status and scheduling. As I view our docket we have a series of motions that we need to pick a date to hear. I don't know what your own timing is but would you be prepared to hear those as early as Friday morning?

MS. COX: Your Honor, I have another commitment that would be very hard for me to move Friday morning at 11.

THE COURT: Uh-huh. Well we need to take what time we need. How about – okay. Well I guess we need to make a record and have you tell me who represents whom.

MS. ROSE: Susan Rose for the plaintiffs.

MS. COX: Carolyn Cox Your Honor here on behalf of San Juan Health Service District, Roger Atcitty, John Lewis Patsy Shumway. With respect to the tribal court claims, Reid Wood and Luarie Schafer.

THE COURT: Okay.

MR. HARRISON: Robert Harrison for the Health District, Cleal Bradford, Dr. James Redd, Dr. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Lori Wallace Carla Grimshaw, Gloria Yanito, Julie Bronson, Laurie Schafer and Reid Wood.

THE COURT: Okay.

MR. TRENTADUE: I'm Jesse Trentadue, Your Honor, here on behalf San Juan County, former Commissioner Redd and Commissioner Lewis.

THE COURT: Okay.

MR. TRENTADUE: May I address the court sir on a suggestion? If I might suggest something on the calendar Your Honor?

THE COURT: Okay.

MR. TRENTADUE: If we could set out a date for argument far enough in the future I'm sure the parties in the very near future would submit motions for summary judgment on subject matter jurisdiction in accordance with the circuit opinion.

THE COURT: Okay.

MS. ROSE: Your Honor, the question arrises under the Tribal Exhaustion Doctrine whether or not it would be more proper to remand the case to Navaho court before any summary judgment motions are made in this court.

THE COURT: I think I'm stuck with the terms and conditions of the mandate that when the court of appeals sent the matter back to Judge Kimball but I 'm happy to hear appropriate motions. I was going to say how about the, how about Tuesday the 28th? Is that too soon?

MS. COX: That's fine, Your Honor.

THE COURT: Would that work for everybody, Tuesday the 28th?

MS. COX: That's on the pending motions now that have been filed by plaintiffs?

THE COURT: All of the existing pending motions.

MS. COX: Not motion for summary judgment?

THE COURT: Well I'll read you the motions, as a matter of fact I've got them here, but the currently pending motions are on the 28th. Of course we're always interested in the question of jurisdiction. The question of jurisdiction is endemic to the Court of Appeals' opinion it seems to me.

It seems to me that it's a question of jurisdiction over what and I think we need to think about that and be in a position to talk about that and while the Navaho court in its opinion made reference for example to Montana there was no specific application of the doctrines of Montana to this particular rather unusual fact situation.

But why don't we say Tuesday the 28th at 9:30 in the morning, all currently pending motions. I've tried to familiarize myself with the subject matter of what the Court of Appeals talked about and we really have to resolve the jurisdictional question it seems to me and we have to really define what's left and I'm interested in people coming and telling me what's left.

Many of the items that we dealt with before have heretofore been resolved. I do note that plaintiff's motion to dismiss the EMTALA and Health Care Quality Improvement Act Claims, docket number 463 filed November 25th are now moot and I take it ought to be, you don't have any problem with that determination, your motion, that is you're dismissing those claims?

MS. ROSE: Uh, yes.

THE COURT: Isn't that right, the EMTALA and Health Care Quality Improvement Act claims?

MS. ROSE: That would be fine.

THE COURT: It was your motion and I think we can grant that at this point without further ado. See you on the 28th. Think about jurisdiction and think about over what.

MS. COX: Do you have a date Your Honor by which you'd like us to file our motions on jurisdiction, motions to dismiss based on jurisdiction?

THE COURT: Well I think it's a matter of looking at what's there. File them by the 27th, everybody.

MS. ROSE: Your Honor, just for clarification so that there's no confusion on my part, when you're talking about jurisdiction are you talking about the jurisdiction of the Navaho court over the claims that the Navaho court orders addressed?

THE COURT: Yeah. Your effort here was to have this court as I understand it enforce the decree of the Navaho court.

MS. ROSE: That's true.

THE COURT: Okay. So that we're talking about the jurisdiction of this court and we're talking about the jurisdiction as well of the Navaho court but you're asking that this court enforce that order.

MS. ROSE: And may I say Your Honor it would be extremely helpful to the plaintiff if the defendants would brief this matter in time for us to study their briefs and their positions and respond.

THE COURT: Well we're interested in both of you briefing it but I don't have any trouble if it's convenient for counsel for plaintiffs, you know, it's your burden at this point. Today's the 7th. Can you get me whatever you want to get me by the 21st?

MS. ROSE: This is one of the reasons why we put in a motion for remand Your Honor.

THE COURT: Well -MS. ROSE: In the interim time between our filing there have been 3 very important Supreme Court decisions

THE COURT: You're welcome, you're welcome to raise those questions and we'll deal with them on the 28th. Whatever questions you want to raise them in your writings by the 21st.

MS. ROSE: Your Honor, I have a problem with meeting that deadline because of other case burdens that I do have.

THE COURT: Well when can you get it done?

MS. ROSE: The 21st just happens to be a horrendous deadline for me.

THE COURT: Okay.

MS. ROSE: But I can provide them by the 28th if you wish to have a hearing somewhat later.

THE COURT: Okay.

MS. COX: Your Honor, I go into trial in Judge Stewart's courtroom on the 3rd, 4th and 5th so –

THE COURT: Okay.

MS. COX: – of February.

THE COURT: Okay. Well let's, let's have you, why don't we have you get your material in, can you get your material in by the 27th, that's a Monday?

MS. ROSE: By the 27th, yes.

THE COURT: 27th.

MS. ROSE: But -

THE COURT: You other folks respond if you will please by the 7th and let's hear argument on Thursday the 20th of February.

MS. COX: I apologize Your Honor, I should have brought my calendar, I ran out. I may be in Denver that day but I'll check and call.

THE COURT: No, we need to fix it. I'm not going to wait for anybody to call.

MS. COX: Okay.

THE COURT: If that isn't a good day let's fix a day that's good.

MS. COX: Could we do it either on the 19th or the 21st Your Honor?

THE COURT: The 21st is tough.

MS. COX: Or that next Monday?

THE COURT: The 24th at 9:30.

MS. COX: Thank you, Your Honor.

THE COURT: Does that work for everybody?

MR. HARRISON: Yes, Your Honor.

MR. TRENTADUE: Yes, sir.

THE COURT: Target dates as indicated. We're really interested in the jurisdictional question mainly. think that's the kernel within the opinion and as applied, as applied. Let's do the best we can. See you then. Thanks.

MR. TRENTADUE: Thank you, sir.

MS. COX: Thank you.

THE COURT: Okay.

(Hearing concluded)

REPORTER ' S CERTIFICATE

STATE OF UTAH

COUNTY OF SALT LAKE

I, REEVE M. BUTLER, do hereby certify that I am an Official Court Reporter for the United States District Court for the District of Utah;

That as such Reporter I attended the hearing of the foregoing matter on and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the

foregoing pages numbered from 2 to 8 constitute a full, true and correct report of the same.

DATED at Salt Lake City, Utah, this 6th day of February, 2003.

REEVE M. BUTLER, RPR

EW 11ia

Case No. 2:00CV584

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DISTRICT

DR. STEVEN MACARTHUR et al.,
Plaintiffs,

vs.

SAM JUAN COUNTY et al.,
Defendants.

Salt Lake City, Utah
Date: January 29, 2003
Time: 1:20 p.m.

REPORTER'S TRANSCRIPT
BEFORE: THE HONORABLE BRUCE S. JENKINS

APPEARANCES OF COUNSEL:

For the Plaintiffs: SUSAN ROSE, ESQ.

For the Defendants: CAROLYN COX, ESQ., ROBERT HARRISON, ESQ., and JESSE TRENTADUE, ESQ.

Court Reporter: REEVE M. BUTLER
Official Court Reporter, RPR
Rm. 467 Federal Bldg.
350 S. Main Street
Salt Lake City, Utah 84101
Tel. 328-0837

THE COURT: Good afternoon and why don't we turn to MacArthur and others verses San Juan County and others. It's 00C-584 here today on a motion to extend time and those who are making appearances if you'll make a record for us.

MR. ROSE: Susan Rose for the plaintiffs.

THE COURT: Okay.

MS. COX: Carolyn Cox Your Honor for defendant San Juan Health Services District, Reid Wood, Cleal Bradford, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway.

MR. TRENTADUE: Jesse Trentadue Your Honor here on behalf of the San Juan County defendants which would be San Juan County, San Juan County Commissioners, San Juan County Attorney and the administrator.

MR. HARRISON: Robert Harrison for San Juan Health Services District, Dr.'s Redd, Jones and Nelson, Marilee Bailey, Ora Lee Black, Carla Grimshaw, Gloria Yanito and Julie Bronson.

THE COURT: Okay. And you go ahead.

MR. ROSE: Your Honor, since I filed that motion I filed a subsequent motion also. We're going to be taking the appeal that came down from the 10th Circuit on up to the Supreme Court and we're also going to be including in that the order for remand itself and in light of that and all the preparatory work that has to be done on those documents I can't, I can't do everything and so I'm asking for an extension of time to reply to some of the motions that are before the court so that I can adequately prepare the petition for certiorari.

THE COURT : When's that due?

MR. ROSE: We have, it's our understanding that it's due February 5th, Your Honor.

THE COURT: Okay.

MS. ROSE: That's our calculation.

THE COURT: Okay.

MR. ROSE: And if we're taking the remand order up itself, questioning the remand itself I'm wondering if judicial economy would not warrant doing nothing further on the Navaho portion of the case because, at least until the Supreme Court determines if it's going to accept or reject our petition.

THE COURT : Uh-huh.

MR. ROSE: May I add one thing -THE COURT: Of course I have what I have and until such time as a court vacates the order of the remand that they set down I'm obligated to pursue the matter with some degree of dispatch. Your petition's due the 5th?

MR. ROSE: That's as I understand it Your Honor.

THE COURT: Okay. Okay. Now we've previously continued a series of your responses that were due if I remember correctly in December and based upon a prior motion we continued those matters and set up particular target dates. Okay. Well let me hear from counsel.

MR. ROSE: May I, may I add just one smail thing?

THE COURT: Sure.

MR. ROSE: It would seem that also with the petition going up if, I just want to point out to the court that my research and perhaps theirs varies but my research shows that in the past 3 to 5 years I have not seen a petition dealing directly with subject matter jurisdiction of the tribal court be rejected and so we believe that the likelihood of it being accepted may be quite good.

THE COURT: Oh knows. We do what we do.

MS. COX: Your Honor, I think I speak on behalf of most of the defendants, they can chime in to the contrary. When Ms. Rose called and asked for an extension we didn't have a problem extending the briefing schedule a little bit. We wanted to keep that 24th hearing if at all possible.

As you've noted plaintiff's counsel has filed a number of motions, we've responded to those and we would like to keep this going so again we have no problem with giving her a little additional time to file her brief but it was due on the 27th, a good 10 days before her petition for cert apparently is due and I understand the timeliness problems and we're happy to give her a little additional time.

We do believe Your Honor that we should keep going forward on this case. Petitions for cert aren't usually, very few are granted. I have no way of knowing what the court's done with respect to subject matter jurisdiction ones but that would be our position.

THE COURT: Anybody else? Okay. Let's see, we had noticed out for the 24th all pending motions. Of the particular motion filed we noticed out here today was

the opportunity to reply to a response that had previously been filed on a motion.

MS. COX: Your Honor, I would note that the plaintiff's counsel, the one specific thing she said was a reply to her, on disqualification. There was one actually filed on the 26th.

THE COURT: There was, the 3rd motion, the 3rd motion dealing with the same subject matter and I note that but it would seem to me that what we ought to do here is to let you get your petition in, that's as you say due the 5th. Let me have you get the statement, the position, however you want to characterize it in reference to the remanded question. If you'll get that in by say the, well let's say the 13th of February. If you're going to respond by the 20th and we'll keep the matter on the calendar for the 24th for all pending motions.

MR. ROSE: May I ask a question Your Honor? What was the briefing, what was the subject matter of the briefing that you just requested?

THE COURT: Well I was interested in the specific question raised by the court of appeals and particularly as to the application of Montana if I remember right in reference to the jurisdiction question.

MS. COX: Judge, could defendants just ask and I'm sure plaintiff's counsel has been good about this, if she could hand deliver it to us on the 13th since we'll just have a week to respond.

THE COURT: Yeah, in your hands by the 13th.

MR. ROSE: May I ask another question Your Honor? We are concerned about from our perspective the court's

statement that it would probably dismiss the case on procedural grounds and possibly dismiss it so that it could go up on appeal.

THE COURT: I'm not acquainted with such a statement.

MR. ROSE: Pardon me?

THE COURT: I say I'm not acquainted with such a statement. I've made no ruling in reference to that particular matter. That's the whole point is the jurisdictional question that needs to be resolved and –

MR. ROSE: Your Honor – I'm sorry, I didn't mean to interrupt. The question that we're going to be asking on our petition it's going to challenge the Montana doctrine itself and –

THE COURT: That's fine, you know, have at it.

MR. ROSE: But would you consider hearing the recusal motion before proceeding with any other actions on the case?

THE COURT: I'm happy to do that. We'll put that first on the calendar for the 24th. Anything else?

MS. ROSE: May I ask one question? Has the court any predisposition towards whether or not it would or would not disqualify itself on this case?

THE COURT: Well I'll deal with that at an appropriate time. As you've requested we'll deal with that first on the 24th.

MR. ROSE: Just a housekeeping item Your Honor, under Rule 25(d), I believe it's 25(d)l, when a political entity is

a party there's an automatic substitution of the parties but the court can still sign a formal order and just for the purposes of captioning on the case can - I drafted an order and I'd like to give it to opposing counsel and if they have any objections to it I'm sure that they can speak to those but basically we have 2 new county commissioners in office and I'd like to substitute their names into the caption?

THE COURT: Well you should follow the rule and do that on a formal basis and we'll deal with the matter and I'll be happy to look at that on the 24th as well if you get the matter filed.

MR. ROSE: And may I, may I just state one thing, under Rule 25 the parties are automatically substituted, it's just for, the order is just for purposes of listing the names in the caption both here and also for the Supreme Court.

THE COURT: Well you're perfectly at liberty to do what you think is best for your client. I simply won't pass on the matter until I see it in written form.

MR. ROSE: May I approach Your Honor?

THE COURT: You're welcome to file it with the clerk but I one deal with the matter.

MS. ROSE: All right.

THE COURT: You're welcome to file it. MS. ROSE: It's just the order.

THE COURT: And remember the target dates that we have and let's meet those. I've had occasion to on a cursory basis examine the history of this case according to the entries in the court docket and there have been

immeasurable motions to continue, innumerable motions to continue and we all need to remember the target dates because those are dates that are set in stone and we're going to move ahead as best we can. Okay. Thanks very much.

MS. COX: Thank you Your Honor.

(Hearing concluded)

REPORTER' S CERTIFICATE

STATE OF UTAH

COUNTY OF SALT LAKE

I, REEVE N. BUTLER, do hereby certify that I am an Official Court Reporter for the United States District Court for the District of Utah;

That as such Reporter I attended the hearing of the foregoing matter on and thereat reported in Stenotype all of the testimony and proceedings had, and caused said notes to be transcribed into typewriting; and the foregoing pages numbered from 2 to 9 constitute a full, true and correct report of the same.

DATED at Salt Lake City, Utah, this 6th day of February 2003.

REEVE M. BUTLER, RPR

EW 119a

03-4036

UNITED STATES COURT OF APPEAL FOR THE TENTH CIRCUIT

In re: FRED RIGGS; DONNA SINGER; ALISON DICKSON; STEVEN MACARTHUR; MICHELLE LYMAN; HELEN VALDEZ,
Petitioners.

ORDER

Filed February 20, 2003

Before KELLY and HENRY, Circuit Judges.

Petitioners have filed a petition for writ of mandamus, asking this court to vacate and replace its decision in MacArthur v. San Juan County, 309 F.3d 1216 (10th Cir. 2002), and to direct the district court either to recuse or to follow different directions than those given in the court's 2002 decision.

We deny the petition for writ of mandamus. With regard to this court's 2002 decision, petitioners' mandamus petition amounts to an untimely petition for rehearing. With regard to the district court, petitioners may file an appeal from any judgment adverse to them. Because petitioners have "other adequate means to attain the relief [they] desire[]," they are not entitled to mandamus relief. Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) (per curiam).

The petition for writ of mandamus is denied.

Entered for the Court

PATRICK FISHER, Clerk

By:

Deputy Clerk

EW 121a

No. 01-4001

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. STEVEN MACARTHUR; DR. NATHANIEL PENN; MICHELLE LYMAN; HELEN VALDEZ; CANDACE LAWS; PAUL KEITH; DOROTHY KEITH; LINDA CACAPARDO; SUE BURTON; AMY TERLAAK; ALISON DICKSON; CANDACE HOLIDAY; NICOLE ROBERTS; DONNA SINGER; FRED RIGGS,
Plaintiffs-Appellants,

v.

SAN JUAN COUNTY; SAN JUAN HEALTH SERVICES DISTRICT; J. TYRON LEWIS, Commissioner; BILL REDD, Commissioner; CRAIG HALLS; MARK MARYBOY, Commissioner, official capacity only; REID M. WOOD; CLEAL BRADFORD; ROGER ATCITTY; JOHN LEWIS; JOHN HOUSEKEEPER; KAREN ADAMS; PATSY SHUMWAY; DR. JAMES D. REDD; DR. L. VAL JONES; DR. MANFRED R. NELSON; RICHARD BAILEY; SAN JUAN FOUNDATION; MARILEE BAILEY; ORA LEE BLACK; GARY HOLLADAY; LORI WALLACE, also known as Laurie Walker; FARMER'S/TRUCK INSURANCE; ST. PAUL'S INSURANCE; CARLA GRIMSHAW; GLORIA YANITO; JULIE BRONSON; R. DENNIS ICKES; LAURIE SCHAFER,
Defendants-Appellees.

October 7, 2002, Filed

COUNSEL: Carolyn Cox (Blaine J. Benard with her on the brief) of Holme Roberts & Owen L.L.P., Salt Lake City, Utah, for Defendants-Appellees San Juan Health Services District, Reid Wood, Roger Atcitty, John Lewis,

John Housekeeper, Karen Adams, Patsy Shumway, Gary Holliday, and Lauren Schafer.

Jesse C. Trentadue of Suitter Axland, Salt Lake City, Utah, for Defendants-Appellees San Juan County, J. Tyron Lewis, Mark Maryboy, Bill Redd, Craig Halls, and Richard Bailey.

Kyle M. Finch of Miller, Stratvert & Torgerson, P.A., Farmington, New Mexico, submitted a brief for Defendant-Appellee Farmer's/Truck Insurance.

Robert R. Harrison and David W. Slagle, of Snow, Christensen & Martineau, Salt Lake City, Utah, submitted a brief for Defendants-Appellees Cleal Bradford, Dr. James Redd, Dr. L. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Lori Wallace, Carla Grimshaw, Gloria Yanito, and Julie Bronson.

R. Dennis Ickes, Pro se.

JUDGES: Before EBEL, McKAY, and LUCERO, Circuit Judges.

OPINIONBY: LUCERO

OPINION: **LUCERO**, Circuit Judge.

Key to our determination of this appeal is the question whether the courts of the Navajo Nation may exercise jurisdiction over a case brought by private individuals against a Utah county alleging violations of Navajo law. Contrary to the district court's ruling, we conclude that resolution of this question lies in Montana v. United States, 450 U.S. 544, 67 L. Ed. 2d 493, 101 S. Ct. 1245 (1981) (defining the scope of tribes' inherent

sovereignty), rather than in the doctrine of state sovereign immunity.

I

The parties bring to us a procedural quagmire marked by a profound lack of clarity–at times approaching confusion–in their litigation before the Navajo Nation district court and their pleadings before the federal district court below. That pattern continues here.

Rather than including a complete statement of relevant facts as required by Fed. R. App. P. 28, appellants' opening brief incorporates facts as stated in a Navajo Nation judicial record. Appellants fail to comply with Fed. R. App. P. 30(a)(1)(B), which requires the filing of an appendix to the briefs including "relevant portions of the pleadings." This being an appeal from a Fed. R. Civ. P. 12(b)(6) dismissal for the complaint's failure to state a claim upon which relief may be granted, Rule 30(a)(1)(B) requires, at a minimum, inclusion in the appendix of the complaint at issue. See 10th Cir. R. 30.1(A)(1) (stating that the appendix to the briefs must be "sufficient for considering and deciding the issues on appeal"). Were it not for appellees' submission of the complaint, we would be inclined to affirm the district court's dismissal on this basis alone. See 10th Cir. R. 30.1(A)(3) (stating that this court is not obliged to "remedy any failure of counsel to provide an adequate appendix").

As best as we can tell, the facts are as follows.

A

Montezuma Creek Clinic is located within the boundaries of the Navajo Nation and was, during

relevant times, operated by the San Juan Health Service District ("Health District")–a special service district organized by San Juan County, Utah ("County")–under contract with the federal Indian Health Service ("IHS") to provide health care to members of the Navajo community. The clinic and land upon which it is located was purchased by the State of Utah as part of the Utah Navajo Trust Fund.

In April 1999, Fred Riggs, Donna Singer, and Alison Dickson, all of whom were employed at the clinic, sued the Health District and County, among others, n1 in Navajo Nation district court for, among other things, alleged violations of the Navajo Preference in Employment Act ("NPEA"), Nation Code tit. 15, §§ 601-609. n2 The NPEA, which was enacted by the Navajo Nation, requires employers to "give preference in employment to Navajos," id. § 604(A)(1), and to file with the Office of Navajo Labor Relations a written affirmative-action plan, § 604(A)(2).

In pretrial proceedings, the Navajo court concluded that Riggs, Singer, and Dickson demonstrated a substantial likelihood of success on the merits of their NPEA claims and entered a preliminary injunction in their favor. The Navajo court was troubled by what it perceived as a sharp drop in visits to the clinic by diabetic patients. In the court's view, "The reason these patients have not been coming in for life critical medical care is due to San Juan Health Service District's billing of IHS eligible patients, making them believe they must pay for medical services before receiving medical attention." (1 Appellants' App. at 77.) Under the preliminary injunction, the County and Health District were required to reinstate Singer and Riggs to their prior positions at the clinic; to give Dickson full-time employment status; to compensate Singer, Riggs, and Dickson for their lost

income; to expunge Singer's and Riggs's personnel files; and to pay attorney's fees. Moreover, the Navajo court prohibited the County and Health District from:

> Eliminating Emergency Medical Technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic; and, Interfering with the laboratory services to the Montezuma Creek Clinic; and, Interfering with the pharmaceutical services provided to the Montezuma Creek Clinic, and immediate payment of all current and past due billings; and, Interfering with any form of patient care, by, among any other matter or things, billing IHS patients; and Interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic . . . .

(1 id. at 85-86.) n3

In its order granting a preliminary injunction, the Navajo court found that the defendants had engaged in a pattern of bad faith conduct toward the court, had wasted judicial resources, had engaged in "repeated misrepresentations of fact and law," had engaged in evidence spoliation, had intimidated and tampered with witnesses, had obstructed testimony, and had engaged in the sandbagging of evidence. (1 id. at 80.) In the Navajo court's view, the defendants had made frivolous claims against Navajo plaintiffs and subjected them "to a trial by tabloid." (1 id. at 81.) Seizing on these conclusions, Riggs, Singer, and Dickson modified their complaint to add as defendants the clinic's insurer, Truck Insurance Exchange ("Truck Insurance"), and its attorney, R. Dennis Ickes. On May 3, 2000, the Navajo court took the extraordinary step of holding that Truck Insurance and Ickes should be bound by the preliminary

injunction. The court also granted Riggs, Singer, and Dickson leave to seek enforcement of the preliminary injunction in state or federal court "pursuant to principles of comity and applicable law." (1 id. at 106.)

B

Riggs, Singer, Dickson, and twelve other individuals filed a complaint in United States district court against (1) the County, Health District, and a number of County and Health District officials ("County and Health District defendants"); (2) Truck Insurance; and (3) Ickes. The complaint listed various causes of action: discrimination and denial of equal protection; denial of free speech and association; denial of due process; antitrust and racketeering violations; fraud, conversion, and theft; and invasion of privacy and defamation. Their complaint also sought enforcement of the Navajo court preliminary injunction and "a declaratory judgment that the Preliminary Injunction Order designed to protect the welfare of the Navajo Nation was issued within the sound jurisdiction of the Navajo Nation District Court and is authoritative over the defendants and the political subdivision" (Health District's Supplemental App. ("H.D. App.") at 46). The complaint asserted: "Pursuant to Strate v. A-1 Contractor, 117 S. Ct. 1404, (1997) [the] Navajo Nation District Court . . . has the right to protect the Navajo Patients' health and welfare, contractual rights of the Navajo people, and the civil rights of all those who are within the Navajo Nation boundaries and seek [the] Court's assistance." (H.D. App. at 48.)

Ruling on a motion to dismiss, the district court held that County and Health District defendants were entitled to sovereign immunity in the Navajo court. Reasoned the district court:

> Tribal courts historically did not possess and therefore have not retained sovereign powers over states. Therefore, absent a state's express waiver of immunity, a state cannot be sued in tribal court. . . . Consequently, political subdivisions of the State of Utah, as defined by Utah law, are immune from suit in tribal courts because the State of Utah has not waived the common law immunity of its political subdivisions from suit in tribal courts.

(2 Appellants' App. at 185.) In a separate decision, the district court dismissed plaintiffs' claim as against Truck Insurance and Ickes. Applying Montana v. United States, the district court held that the Navajo court lacked subject-matter jurisdiction over them.

Appellants seek review of the district court decisions. n4

C

We review the district court's dismissal of appellants' claims under Rule 12(b)(6) for failure to state a claim de novo. Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999). At this stage of the litigation, we accept all well-pleaded allegations in the complaint as true and will sustain the district court's Rule 12(b)(6) dismissal only if it is clear beyond doubt that no relief could be granted under any set of facts that could be proved consistent with the allegations. Id. Our role in this context "is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." Id. (quotation omitted). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683,

71 Ohio Op. 2d 474 (1974), overruled on other grounds by Harlow v. Fitzgerald, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

In deciding a Rule 12(b)(6) motion, a federal court generally "should not look beyond the confines of the complaint itself." Dean Witter Reynolds, Inc. v. Howsam, 261 F.3d 956, 960 (10th Cir. 2001), cert. granted, 122 S. Ct. 1171 (2002). There are two exceptions to this rule. First, the district court may consider "mere argument" contained in the parties' memoranda concerning a motion to dismiss. Ohio v. Peterson, Lowry, Rall, Barber & Ross, 585 F.2d 454, 457 (10th Cir. 1978). Second, "it is accepted practice, if a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." Howsam, 261 F.3d at 961 (quotation omitted).

As stated above, appellants' failure to submit a copy of their complaint to this court on appeal is rendered less harmful by appellees' submission of that crucial document. However, the district court docket entries indicate that appellants filed attachments and an addendum to their complaint on July 26, 2000. We are at a loss as to the contents of these filings. Although it seems clear that the district court relied on facts beyond those alleged in the body of the complaint, there is no way to know from the record before us whether these factual allegations are reflected in the attachments to the complaint. Because appellants do not challenge the district court's decisions on grounds that the court exceeded the proper scope of Rule 12(b)(6) review, we defer to the district court's statements of factual allegations.

II

We first consider whether the district court properly dismissed appellants' claims against Truck Insurance and Ickes.

A

Long before the arrival of Europeans on this continent, tribes were self-governing political communities. Nat'l Farmers Union Ins. Cos. v. Crow Tribe, 471 U.S. 845, 851, 85 L. Ed. 2d 818, 105 S. Ct. 2447 (1985). As such, the tribes possessed the full attributes of sovereignty, which included "the inherent power to prescribe laws for their members and to punish infractions of those laws." United States v. Wheeler, 435 U.S. 313, 323, 55 L. Ed. 2d 303, 98 S. Ct. 1079 (1978). Although "their incorporation within the territory of the United States, and their acceptance of its protection necessarily divested them of some aspects of the sovereignty which they had previously exercised," id., this divestiture was not absolute. Today, tribes retain sovereignty of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id.

As Felix Cohen observed in his seminal work on the subject of federal Indian law, "Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty

which has never been extinguished." Felix S. Cohen, Handbook of Federal Indian Law 122 (1941); see Wheeler, 435 U.S. at 322. Contrary to County defendants' assertion on appeal (see County Appellees' Br. at 20), tribes are not subordinate to the states, see Washington v. Confederated Tribes, 447 U.S. 134, 154, 65 L. Ed. 2d 10, 100 S. Ct. 2069 (1980), and certainly not to counties.n5

The leading case defining the scope of tribal inherent civil authority is Montana v. United States. Montana articulates the general rule that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Generally, "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." Id. at 565. But there may be cases in which inherent civil authority will extend to the conduct of non-Indians on reservations. First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Id. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

In a pair of subsequent cases, the Supreme Court applied Montana to address the scope of inherent civil adjudicative authority as well, holding that "as to nonmembers . . ., a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." Strate v. A-1

Contractors, 520 U.S. 438, 453, 137 L. Ed. 2d 661, 117 S. Ct. 1404(1997); Nevada v. Hicks, 533 U.S. 353, 357-58, 150 L. Ed. 2d 398, 121 S. Ct. 2304 (2001). In Hicks, the Court acknowledged that this "formulation leaves open the question whether a tribe's adjudicative jurisdiction over nonmember defendants equals its legislative jurisdiction." 533 U.S. at 358.

B

In evaluating appellants' declaratory judgment claim against Truck Insurance, the district court stated that in April 1999,

there was in effect a Comprehensive Hospital Liability Policy issued by Truck, which, among other things, covered the Montezuma Creek Clinic, which was operated by the San Juan Health Services District . . . . Consequently, Truck retained Mr. Ickes to represent the District and related defendants . . . in the Tribal Court action. Because, there were coverage issues as to many of the claims brought by Plaintiffs in the Tribal Court proceedings, however, Mr. Ickes was retained solely to represent the interests of Truck's insureds. Mr. Ickes was not retained to, and has not, represented Truck at any time pertinent to this action.

(2 Appellants' App. at 198.) In their opening brief, appellants neither take issue with the district court's statement of these allegations nor contend that Truck Insurance is a member of the Navajo Nation such that Montana's presumption against tribal authority would not apply. Rather, they contend that Truck Insurance falls within Montana's consensual relationship exception. According to appellants,

Truck's contract for liability insurance was an inherent

aspect attaching to each Navajo patient's contract for services with the clinic. But for the Navajo patients, Truck would not have had a contract with the defendants for the clinic. Truck's contract was an inherent aspect of Attorney Ickes' representation of the defendants. Attorney Ickes kept Truck informed.

(Appellants' Br. at 28.)

We reject appellants' argument. Under Montana's consensual relationship exception, the relationship must be one between the nonmember and "the tribe or its members." 450 U.S. at 564. Here, Truck Insurance's contractual relationship was with the clinic, another nonmember. Thus, the Navajo Nation's exertion of authority over Truck Insurance is too attenuated to fall under Montana's consensual relationship exception. See Atkinson Trading Co. v. Shirley, 532 U.S. 645, 656, 149 L. Ed. 2d 889, 121 S. Ct. 1825 (2001) ("Montana's consensual relationship exception requires that the tax or regulation imposed by the Indian tribe have a nexus to the consensual relationship itself.").

We also reject appellants' contention that their declaratory judgment claim against Ickes, who is not a member of the Navajo Nation, was improperly dismissed. Appellants claim that the Navajo Nation may regulate Ickes's activity because he entered into a consensual relationship with the tribe–i.e., he became a member of the Navajo Nation Bar Association. We agree that Ickes's membership in the Navajo Nation Bar Association and his practice before the Navajo district court constitute a consensual relationship with the Navajo Nation. However, our Montana inquiry does not end with this determination. As was the case with respect to Truck Insurance, the requisite nexus between

the consensual relationship and the exertion of tribal authority is missing.

By enrolling as a member of the Navajo Nation Bar Association, Ickes agreed to follow the American Bar Association's Model Rules of Professional Conduct, which have been adopted by the Navajo Nation Supreme Court. Rule 8.5(a) of the Model Rules provides, "A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction . . . ." In our judgment, the power to discipline an attorney for alleged misconduct in court is distinct from the power to join the attorney as a defendant with the clients he is representing before that court. n6 As the Supreme Court observed in Atkinson, the rule is not "in for a penny, in for a Pound." 532 U.S. at 656 (quotation omitted).

We are also unpersuaded that Montana's self-government exception should apply with respect to Ickes. This exception "grants Indian tribes nothing beyond what is necessary to protect tribal self-government or to control internal relations." 532 U.S. at 658-59 (quotations omitted). Surely, the Navajo Nation's interest in regulating attorney conduct is great. See Goldfarb v. Va. State Bar, 421 U.S. 773, 792, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975). But it is a long leap, and one we are unwilling to take, to suggest that the action taken by the Navajo court in this case was necessary to protect Navajo self-government or control its internal relations. If warranted, the Navajo Nation may protect its political integrity through other means, such as "the imposition of disbarment, suspension or reprimand of the offending attorney[]." Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 106 N.M. 757, 750 P.2d 118, 123 (N.M. 1988).

C

Appellants contend that the Navajo court's actions respecting Ickes are sanctioned by federal law, namely 25 U.S.C. § 1302. This argument is utterly devoid of any merit. Section 1302 is an express divestiture of tribal authority, providing, among other things, that no Indian tribe may "deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law." 25 U.S.C. § 1302(7); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 57, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978) (stating that in § 1302, "Congress acted to . . . impose certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment").

D

In contrast to their claim seeking a declaratory judgment, appellants' claim for enforcement of the Navajo court's preliminary injunction with respect to Truck Insurance and Ickes raises important questions concerning the proper role of federal courts. n7 Although a tribal court defendant may bring a federal cause of action for an injunction where the basis of the claim is assertion of "a right to be protected against an unlawful exercise of Tribal Court judicial power," Nat'l Farmers, 471 U.S. at 851, 852, this right to be free from tribal court interference does not necessarily support a federal claim seeking enforcement of a tribal decree. Although the sovereign powers of the Navajo Nation are held "only at the sufferance of Congress," Wheeler, 435 U.S. at 323, these powers are rooted in Navajo, not federal, law. "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate." NLRB v. Pueblo of San Juan, 276

F.3d 1186, 1192 (10th Cir. 2002) (en banc) (footnote omitted). To the extent appellants' complaint anticipates a defense arising under federal law, it runs up against the well-pleaded complaint rule. See Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 152, 53 L. Ed. 126, 29 S. Ct. 42 (1908).

Appellants nonetheless seek enforcement of the Navajo court injunction under Full Faith and Credit Clause of the Constitution or, in the alternative, comity principles. Under the Full Faith and Credit Clause,

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1. Full faith and credit principles are also in place as a matter of statute:

Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738. According to appellants, tribes historically have been viewed as territories of the United States. In fact, Supreme Court cases point in opposing directions. Compare United States ex rel. Mackey v. Coxe, 59 U.S. (18 How.) 100, 103, 15 L. Ed. 299 (1855) (holding that the Cherokee Nation was a "territory" for purposes of a federal letters of administration law), with New York ex rel. Kopel v. Bingham, 211 U.S. 468, 474-75, 53 L. Ed. 286, 29 S. Ct. 190 (1909) (citing, with approval,

Ex Parte Morgan, 20 F. 298, 305 (W.D. Ark. 1883), which held that the Cherokee Nation was not a "territory" within the meaning of the federal extradition statute). See generally Wilson v. Marchington, 127 F.3d 805, 808-09 (9th Cir. 1997) (discussing the issue at length and ultimately holding that neither the Full Faith and Credit Clause nor 28 U.S.C. § 1738 is applicable to tribal judgments). We need not address this issue because appellants admit that they

> did not argue full faith and credit in the Federal [district] Court, but upon further consideration of the full pervasiveness of the United States in Tribal Court systems, and given the need for preliminary injunctions in health and public safety emergencies, the Plaintiffs now argue full faith and credit is appropriate for exclusively tribal claims under the facts of this case.

(Appellants' Br. at 36 n.14.) As a general rule, this court will not consider an issue on appeal that was not pressed below, Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992), and we choose not to do so today. We thus proceed with the assumption that the Navajo Nation injunction is enforceable in federal court as a matter of comity.

We are unwilling to enforce judgments of tribal courts acting beyond their authority, especially where defendants have a federal right "to be protected against an unlawful exercise of Tribal Court judicial power," Nat'l Farmers, 471 U.S. at 851; see Wilson, 127 F.3d at 810 (holding that "federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law"). Therefore, given our earlier conclusion that the Navajo court lacked subject-matter jurisdiction over

Truck Insurance and Ickes, we must affirm the district court's dismissal of appellants' enforcement claim as against those parties.

III

We proceed to review the district court's dismissal of appellants' claims against County and Health District defendants.

A

In its memorandum decision and order, the district court ruled that the Navajo court suit against County and Health District defendants was barred by the doctrine of sovereign immunity. The Navajo court's exercise of jurisdiction over these defendants was, in the district court's view, "nonsensical" and "ludicrous." (2 Appellants' App. at 190.) The district court based its decision on constitutional sovereign-immunity principles, stressing that the Constitution never would have been ratified had the states been stripped of their sovereign authority "'except as expressly provided by the Constitution itself.'" (2 id. at 185 (quoting Alden v. Maine, 527 U.S. 706, 727, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)).) As exemplified by such decisions as Alden and Hans v. Louisiana, 134 U.S. 1, 33 L. Ed. 842, 10 S. Ct. 504 (1890), the federal doctrine of sovereign immunity holds that the federal government may not, as a general matter, infringe the states' immunity from private suit.

Appellants contend that the district court's analysis of their claims against County and Health District defendants should have proceeded under Montana and subsequent cases defining tribal inherent sovereignty.

Had these principles been applied, say appellants, dismissal would have been improper.

B

We begin our analysis with the acknowledgment that federal sovereign immunity and Montana are distinct legal doctrines. On a practical level, however, both Montana and sovereign immunity may potentially divest the Navajo court of the power to adjudicate the parties' suit. n8

The district court's reliance on federal sovereign immunity misunderstands the doctrine as defined by the Supreme Court. See Nevada v. Hicks, 533 U.S. 353, 373-74, 150 L. Ed. 2d 398, 121 S. Ct. 2304 (2001); Nevada v. Hall, 440 U.S. 410, 414, 59 L. Ed. 2d 416, 99 S. Ct. 1182 (1979) ("The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign."). Nonetheless, at this point in the analysis it would be premature to decide the sovereign immunity question because there remains a threshold question of the tribe's jurisdiction under Montana.

C

The threshold question in our review of the Navajo court judgment is whether the Navajo Nation's decision to exercise adjudicative power over County and Health District defendants passes muster under Montana. If, and only if, appellants overcome the heavy presumption Montana establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Our judgment is guided by Nevada v. Hicks, 533 U.S. 353, 150 L. Ed. 2d 398, 121 S. Ct. 2304 (2001) decided by the Supreme Court after the district court's dismissal in the present case. The primary issue in Hicks was whether a tribal court possessed "jurisdiction to adjudicate the alleged tortious conduct of state wardens executing a search warrant for evidence of an off-reservation crime." Id. at 357. The Court concluded that the tribal court did not have jurisdiction, applying the two Montana principles of Indian law that we have already discussed: first, that "'as to nonmembers . . . a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction,'" id. at 357-58 (quoting Strate, 520 U.S. at 453); and second, that "where nonmembers are concerned, the 'exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation,'" 533 U.S. at 359 (quoting Montana, 450 U.S. at 564) (emphasis removed). Although the Court did not answer the question of whether a tribe's adjudicative jurisdiction over nonmembers equals its regulatory jurisdiction, the Court made clear that without regulatory jurisdiction under Montana, a tribe is definitively without adjudicative jurisdiction. 533 U.S. at 358.

Hicks expressly acknowledges that Montana and sovereign immunity are distinct doctrines. Moreover, Hicks rejects the view that "immunity defenses should be considered in reviewing tribal court jurisdiction," 533 U.S. at 373 (quotation omitted), and provides two reasons for this conclusion:

The first is that it is not true. There is no authority whatever for the proposition that absolute-and qualified-immunity defenses pertain to the court's jurisdiction–

much less to the tribe's regulatory jurisdiction, which is what is at issue here. (If they did pertain to the court's jurisdiction, they would presumably be nonwaivable. Cf. Idaho v. Coeur d' Alene Tribe of Idaho, 521 U.S. 261, 267, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997)). And the second problem is, that without first determining whether the tribe has regulatory jurisdiction, it is impossible to know which "immunity defenses" the federal court is supposed to consider.

533 U.S at 373-74 (parallel citations omitted). Hicks thus stands for the proposition that Montana analysis should proceed before considering immunity defenses. n9 In sum, we conclude that the district court should have performed a Montana analysis before reaching the sovereign immunity question.

D

Although the district court did not conduct a proper analysis under Montana, we are nonetheless free to affirm the district court's dismissal on any grounds for which there is a record sufficient to permit conclusions of law, provided the litigants have had a fair opportunity to develop the record. See Seibert v. Oklahoma ex rel. Univ. of Okla. Health Scis. Ctr., 867 F.2d 591, 597 (10th Cir. 1989). We decline to do so, however, and instead vacate the court's dismissal of appellants' claim against County and Health District defendants, and remand the matter for further proceedings. In addition to the fact that County and Health District defendants did not brief the Montana issues on appeal, n10 we have kept in mind the limited nature of our inquiry when assessing Rule 12(b)(6) motions to dismiss for failure to state a claim upon which relief may be granted. "The granting of a motion to dismiss must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but

also to protect the interests of justice." Pelt v. Utah, 104 F.3d 1534, 1540 (10th Cir. 1996) (quotation omitted).

Appellants' position has been that the district court relied on the wrong doctrine in dismissing its claims against County and Health District defendants. We do not intend to suggest an outcome on remand. However, as the Supreme Court has observed, "the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." Nat'l Farmers, 471 U.S. at 855-56 (footnote omitted).

IV

The district court's dismissal of appellants' claim against Ickes and Truck Insurance is **AFFIRMED**. Dismissal of appellants' claim against County and Health District defendants is **VACATED**, and the matter is **REMANDED** for further proceedings consistent with this opinion. All outstanding motions are **DENIED**.

Footnotes

n1 Sued in the Navajo court action were the Health District; chairman of the district governance board Roger Atcitty; former governance board member John Lewis; governance board members Karen Adams and Patsy Shumway; and district director of patient care Laurie Shafer. (See 2 Appellants' App. at 176 n.5.) Also sued were San Juan County, Utah; county commissioners J. Tyron Lewis, Mark Maryboy, and Bill Redd; county attorney Craig Halls; and county

administrator Richard Bailey. (See 2 id. at 176 n.4.) Except for Shumway and Maryboy, who were sued in their official capacities only, the individual defendants were sued in both their official and personal capacities.

n2 Appellants' claim that "they brought only Navajo law claims before the Navajo tribunal" is incorrect. (See Health District Appellees' App. at 247 (Navajo court complaint) (setting forth a claim entitled "The Right to Free Speech as Protected by the Navajo Nation, the United Nations, and the United States"); id. at 248 ("Freedom to Assemble as Protected by the Navajo Nation, the United Nations, and the United States."); id. at 249 ("The right to Due Process protected by the Navajo Nation, United Nations, and the United States."); id. at 255 ("The Right of Equal Protection Specifically Protected by the Navajo Nation, the United Nations, [and] the United States.").

n3 The Navajo court also held "that in the event that the defendants fail to obey the Order of this Court, commencing the [fourth] day of March, 2000, the defendants shall be fined at the rate of $ 10,000.00 . . . per day, for each and every day the Order of this Court is not carried out in its entirety." (1 Appellants' App. at 104.) Moreover, the court ordered "that each and every personal defendant and defendants [sic] counsel will pay $ 1000 per day of the $ 10,000 daily fine beginning March 2, 2000, [sic] from their own personal assets." (Id.)

n4 The district court did not act on appellants' other claims, and consequently, this court originally lacked jurisdiction over this appeal. Title 28 U.S.C. § 1291 grants the courts of appeal "jurisdiction of appeals from all final decisions of the district courts of the United States." Ordinarily, an appealable final judgment is one

that terminates "all matters as to all parties and causes of action." D&H Marketers, Inc. v. Freedom Oil & Gas, Inc., 744 F.2d 1443, 1444 (10th Cir. 1984) (en banc).

While this matter was pending, however, the district court exercised its discretion under Fed. R. Civ. P. 54(b) to direct entry of final judgment on plaintiffs' Navajo preliminary injunction claim. As a result, this court now has jurisdiction over this appeal under § 1291. See Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 583-84, 63 L. Ed. 2d 36, 100 S. Ct. 800 (1980).

n5 We must reject County appellees' assertion "that the natural dominion of States and their political subdivisions over tribal governments was clearly established before the United States Constitution came into being and that there has been nothing post Constitution to change that fact" (County appellees' Br. at 20).

n6 See Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 106 N.M. 757, 750 P.2d 118, 122 (N.M. 1988) (collecting cases, and stating that "an attorney has no duty . . . to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services and that the attorney's undivided loyalty belongs to the client").

n7 Because we recognize a federal right to be free from tribal court interference, it stands to reason that an action for a mere declaration that a tribal court defendant has no such right might be permitted as well. See Fed. R. Civ. P. 57; 10B Charles Alan Wright et al., Federal Practice & Procedure § 2767, at 650 (3d ed. 1998). We do not consider, nor do we decide, whether such relief is available at this interlocutory stage of the parties' tribal court litigation.

n8 We note that County and Health District defendants do not assert sovereign immunity from suit in federal court. Cf. Lincoln County v. Luning, 133 U.S. 529, 530, 33 L. Ed. 766, 10 S. Ct. 363 (1890) (holding that Eleventh Amendment immunity does not extend to counties, cities, or municipal corporations); cf. also Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280-81, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977) (holding that Eleventh Amendment immunity does not extend to local school districts). Moreover, it must be remembered that the County and Health District asserted their sovereign immunity defense in Navajo court. We sit in review of that judgment.

n9 In another telling passage, the Court in Hicks stressed the narrowness of its holding: "We do not say state officers cannot be regulated; we say they cannot be regulated in the performance of their law-enforcement duties. Action unrelated to that is potentially subject to tribal control depending on the outcome of Montana analysis." 533 U.S. at 373.

n10 (Cf. County Appellees' Br. at 3 ("Because the District Court never ruled on the issue of subject matter jurisdiction with respect to San Juan County Appellees, it would be inappropriate for this Court to address that issue on this limited appeal."); Health District Appellees' Br. at 3 (stating that the sole issue on appeal was "whether the district court erred in dismissing plaintiffs' claim seeking enforcement of the tribal court orders as against the Health District defendants on the grounds that the Health District defendants are immune from suit in the tribal court under the doctrine of sovereign immunity").)

EW 145a

AFFIDAVIT OF DONNA SINGER OF DISOBEDIENCE OF NAVAJO COURT ORDERS AND CURRENT ONGOING DAMAGES

Now Comes, Donna Singer, affiant, to state the following is true, under penalty of perjury, upon her best belief and information, as follows:

Background Information

1 Affiant was the manager of Montezuma Creek Clinic (MCC) from about 1995 though December, 1998 under the management of San Juan Health Care Services District and then again in January, 2000 under the management of Utah Navajo Health System through the present.

2. Affiant is married to one of the United States outstanding scholars in the Navajo written language, Lewis Singer, an enrolled Navajo Nation member, who attended Navajo boarding schools and is presently a high school principal within the Navajo Nation.

Familiarity With I.H.S. Regulations:

3. Affiant is thoroughly familiar with Indian Health Service (IHS) Contracts and with the culture and some traditions of the Navajo people in the Montezuma Creek Clinic (MCC) IHS service area.

4. MCC is a 'frontier' medical delivery area. Any other medical care is between 40 and 100 miles away on dangerous roads, where roll overs resulting in high mortality rates are common. Geography and economics require that MCC patients come to MCC for quickest relief for medical problems to protect the patients.

MCC Patients

5. Affiant understands that MCC has about 6000-7000 patients with approximately 60% having some form of insurance, but all Native Americans having access to IHS provision of healthcare either at an 1113 facility or through contracted health care. These patients are covered by IHS and do not need to pay for services provided at MCC and should not receive bills for such care as per federal regulations included in the IHS contracts.

6. Affiant has been told that the Navajo Court defendants have finally worked out any non- payment of IHS services with a financial settlement of an unknown amount with IHS, at some time within the past year.

7. In the meantime, since January, 2000, the clinic has been operated by Utah Navajo Health Systems (UNHS) a private, non-profit organization.

8. The Navajo Nation has designated Utah Navajo Health System as a tribal organization for the purpose of establishing a PL93-6 38 Self-Determination contract for the provision of healthcare The Navajo Nation does not immediately manage, operate or control UNHS, though UNHS must abide by Navajo laws.

The County and District Knew of the Damages
To Native American Patients and Did Nothing

9. Affiant understood fully that in November of 1999 the diabetic program supervisor, Nettie Prack had reported to the Navajo Court that there was a 250% drop in diabetic visits alone as a result of the Navajo Court defendants sending bills to the patients of the Montezuma Creek Clinic. The attorneys for the

defendants, Mr. Ickes and Mr. Moeller were present in Navajo Court when the information was presented, and understood the damage to the Native American people that these bills were causing. Both were familiar with the geography and economics of the area.

10. Affiant is aware that the District's own public records discussed at public District board meetings, during 1999's billings, showed dramatic Native American patient level drops at Montezuma Creek Clinic and Monument Valley Clinic.

11. MCC has (1) sent out mailers and brochures, (2) spoken to chapters and Navajo officials, (3)sent out home visit persons, all in an effort, to try to educated all the diabetic patients and identify any of her patients who stopped using MCC because they had to pay for services due to the Navajo Court defendants billing practices and notify them that they can use these facilities for medical care without being billed and sent to collections.

12. Despite MCC' s best efforts, dozens of diabetic patients are still not coming to MCC.

13. Also, there has been a substantial increase in persons dying and/or needing dialysis at this time, approximately 50 or so patients.

14. Due to lack of phones, lack of good roads, people: living 20 to 30 miles apart in some areas, and a cultural issue concerning talking about people who have died, it is nearly impossible to determine exactly how many people died as a result of not being seen for care either locally or not at all.

15 Affiant knows that by Navajo customs deaths within the Chapters are not always reported to the chapter or MCC.

16. It is nearly impossible to track all patients with other 'silent killer' type diseases such as high blood pressure, anemia, cancer, who are not being screened, examined regularly, or receiving medications due to not coming into MCC or anywhere else for fear they will have to pay because of the hundreds of bills sent to the Native American populations by San Juan Health District from 1999 to approximately 2001.

17. Affiant understands that the Navajo population is vulnerable to threats of bill collection due a long-standing stigma which interferes with Indian eligibility for credit and (1) a high level of unfamiliarity with the English language; (2) lack of education, (3) lack of good roads to facilitate travel. economic and social intercourse and medical treatment; (4) lack of phones, (5) lack of electricity to get phones, and (6) the inability of home visit personnel to get to some places to educate patients due to the disastrous conditions of the innumerable dirt roads.

18. Affiant believes that, ultimately, (1) only radio ads in Navajo language by the defendants, as government organizations that billed these people, and (2) newspaper ads by the defendants, and (3) letters to customers they billed for whom they have address lists; and (4) verbally disc using the issues with Native American patients in their own language on radio and televisions letting them know that they can be seen at MCC without billings, will convince nearly all the people who were coming to the clinic in 1998, to return to the clinic for health care. This is what Affiant understands the Navajo Court ordered the defendants to do.

19. Affiant reasons that getting a letter that does not resemble a bill from the Defendant government organizations, who sent the bills, Will be far more effective, than getting a similar letter from UNHS as statistics demonstrate.

Collateral Damages That Last for Years

20. Affiant also understands that for some of the Native American patients, the bills have ruined any chance they have for obtaining inexpensive housing in the Utah strip, due to destroying their credit, the only requirement for obtaining one of these low income housing loans, and that only by restoring the credit rating of these injured individuals by contacting and correcting the credit reports damaged by court collection and collection agency actions for bills which should have been sent to the Indian Health Services for payments will public confidence be restored in receiving health care at MCC.

Navajo Distrust is Strongly Rooted in Past History

21. Affiant suggests that for anyone to understand why Navajo people wish to live isolated and away from cities and towns and their distrust of San Juan County and Health District governance and white people in general, one only need to look at (1) being forced to abandon their culture and language with very real corporal punishment in boarding schools away from home, by white people; (2) sexual abuse in those boarding schools either perpetrated or tolerated by white people; (3) sterilization of the women for a period of time by white doctors; (4) the horrendous historical long walk that was suffered and is still remembered by today's generations of Navajo; (5) and the lack of any local schools up until 1980's due to white people not

spending any school moneys on the reservations for schools; (6) and lack of representation on juries in the County, even for Navajo and the prosecutions, until after 1993; (7) and the reported lack of interpreters in court rooms and lack of due process within the courtroom where billing judgments were processed; (8) lack of attention to chapter resolutions by the County; and (10) lack of caring about the effect of the actions of the health district and county on access to health care for the diabetic patients and other Native American patients with chronic diseases, illnesses or acute injuries that absolutely require constant care;(11) use of Indians as a means of receiving federal and state funding for projects which were then used to benefit the white man rather than the Indian.

22. Affiant reasons that as long as MCC is associated in some patients minds with the white man's government, some Native American patients will risk travel on dangerous roads to go as much as 100 miles in any direction to get to a known Indian facility. If the patients cannot afford the gas, Affiants' experience informs her that they often put off getting health care until a crises situation develops. Affiant also knows that if there is not gas money, the patient may hitchhike even in winter weather. Affiant observes it is not uncommon to see people traveling for health care to the clinic on the back of pick up trucks in the dead of winter.

Ongoing Damages

23. Affiant is a patient and employee of MCC and is aware that the other Petitioners Riggs and Dickson are likewise patients and employees of MCC.

24. Undoubtedly, the lack of obedience to the Navajo Court orders, is still interfering with Affiant's ability to

manage MCC to provide health care for all Indian patients who should be served by this facility.

25. Affiant is also still suffering from the very public false accusations of fraud, theft, etc. made by the Defendants, even in supreme court documents, wherein they fail to tell the court these accusations were found to be false and unsupported by even so much as one single piece of any evidence of dishonesty.

26. Affiant's resources have been and are currently very severally depleted as a result of this ongoing litigation and Affiant was told by County Administrator, Rick Bailey, in about December 1998, that he was not worried about her claims, because there was a case of a worker suing the county that had gone on 15 years and they could just wait until he gave up.

27. Affiant is aware that her Counsels' resources are also limited, unlike the insurance and government funded law firms for the Navajo defendants.

New Commissioners and Current Negligence
In Resolving the Situation

28. Affiant is aware that the new commissioners have received these orders by certified mail and were aware of the suit when they took office.

29. Affiant has been informed directly that the new Commissioners taking office in January 1, 2003, have signed no consents for the current law firm of Suitter and Axeland to represent them or the County and as of at least March 16, 2003, had not even spoken to them or met them.

30. Affiant has observed that the current Commissioners, knowing of the mounting fines for not carrying out the Navajo orders, are doing nothing to carry out the orders, have read copies of the orders.

31. Affiant understands that the current commissioners would only need to hire a new attorney, and have that attorney meet with her attorneys to begin to work these problems out, but no action on the part of the new Commissioners has been taken to do so, even though the fines do not distinguish between the original officials and the current officials, as long as they disobey these court orders.

32. Affiant believes it is also in the best interest of the County taxpayers to stop the fines by obeying the Court orders at the earliest possible opportunity.

33. Affiant approves of and will move the Navajo Court for an order to place all the fines from the County into a fund for a dialysis center/hospice center within the Utah strip of the Navajo Nation to assist patients harmed by the defendants.

34. Affiant understands that there are means of structuring settlements wherein the people can obtain payment with greatly diminished harm to the defendants.

35. Affiant now believes requesting cooperation with these defendants will not get action, and only an order for the defendants to carry out the Navajo orders will obtain their IMMEDIATE cooperation.

36. Affiant also believes any attempt by the new Navajo Court defendant Health District board members to get the Orders carried out will be futile as two new

members are in the voting minority, and a third new member, is an employee of the County and will generally support the wrongdoing officials.

37. Affiant is aware that the Federal Court, prior to reading the Navajo orders on remand, indicated that essentially the Court would dismiss them so the entire case could go back up on appeal, and has demanded documents to essentially retry the case, not appearing to give the Navajo Court any credibility whatsoever, and appearing to the Affiant to be less than impartial in regards to enforcing the Navajo Court orders.

Further, this Affiant sayeth naught.

Donna Singer

NOTARY CERTIFICATE

County of Coconino
State of Arizona

I, notary public, on this day of April, 24 2003, did witness Donna Singer, appearing before me with a photo I.D., raise her right hand and swear that the foregoing was true upon her best belief and knowledge, and she did sign the foregoing document in my presence.

So signed this 24 day of April, 2003

Notary Public

My commission expires on the 14th day of Sept., 2003

Notary Public
STATE OF ARIZONA
Cocorino County

JENNIFER M. HAGAR
My Commission Expires 09/14/2003

EW 155a

No. SR-CV-1 62-99-C V

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK

Donna Singer, Fred Riggs, Al Dickson
Plaintiffs,

vs.

San Juan County, San Juan Health Services District, et al
Defendants.

AFFIDAVIT OF FRED RIGGS FOR NONCOMPLIANCE

Judge Raymond Begaye

NOW COMES PLAINTIFF FRED RIGGS, by way of affidavit to verify noncompliance with the Navajo Court orders as follows:

1. Plaintiff Riggs is a Navajo enrolled member and lives within the Navajo Nation.

2. Plaintiff Riggs has not been rehired, even for a single day, by the defendants as ordered by this Court.

3. Plaintiff Riggs has not received proof of the complete expungement of all his employment records, and is personally unaware of any compliance certificate being delivered to the Court.

4. Plaintiff Riggs has not received back pay, benefits, retirement benefits and is unaware of any certificate of compliance being so delivered to the court.

5. Plaintiff Riggs has observed that Plaintiff Singer and Dickson has not received their back pay, retirement, and other benefits or been rehired, even for a single day to so compute these benefits according to what these Plaintiffs have said and is unaware of any compliance certificates being delivered to the court for them.

6. Plaintiff Riggs is unaware of any advertising or other information, in Navajo and Ute language, being carried out to notify patients that services are provided without direct billing of the patients at Montezuma Creek Clinic.

7. Plaintiff Riggs understands that the fines to the Court were partly compensatory to the Plaintiffs due to previous contempt as found by the Court and to prevent harm to the plaintiffs and patients harmed.

8. Plaintiff Riggs, and his counsel's resources are being depleted by prolonged, unfair and dishonest practices and representations in Federal Court by the defendants, and the harm is continuing.

9. Plaintiff Riggs is aware that the County untruthfully is telling the Federal Court that essentially the County was not involved at the time of the injuries, when in fact, Plaintiff Riggs knows the county commissioners at that time, sat on the health district's board, the county assistant administrator became the CEO, and the county attorney advised the health district.

Further, this affiant saith naught.

So signed and dated this 25 day of March, 2003.

Fred Riggs, affiant

EW 157a

County of San Juan County

State of New Mexico
I am a certified Notary Public. I witnessed Fred Riggs, with picture identification, sign this document in my presence, and attest to its truthfulness on this 25 day of March, 2003

Notary public

My commission expires on the 29 day of Sept. 2003.

VIVIAN M. MOORE
NOTARY PUBLIC STATE OF NEW MEXICO
SAN JUAN COUNTY
My Commission Expires: September 29, 2003

EW 158a

AFFIDAVIT OF SAN JUAN COUNTY COMMISSIONER MARK MARYBOY

I, Mark Maryboy, San Juan County Commissioner, being duly sworn, do hereby state under penalty of perjury that the following facts are true to the best of our information and belief:

1. I am a duly elected San Juan County Commissioner.

2. I have been a County Commissioner for 14 years

3. The area of my primary representation is much of the Utah Strip of the Navajo Nation reservation

4. My constituents arc primarily Navajo.

5. I am bilingual, speaking both Navajo and English.

6. I have witnessed my constituents coming to the concerning bills they do not understand, and do not know bow to rectify through the appropriate government agencies.

7. I know the Chapter's within the Utah strip have no means for correcting these bills through the different federal chapters.

8. I know that there has been a definite effect of people not going for medical care because they are afraid they may have bills to pay.

9. I witnessed people at Navajo chapter meetings speaking publicly about their bills stating that they received bills for services never received.

10. The people wish to get the bills resolved but do not know how.

11. Many of the people receiving these bills only speak Navajo and therefore they had no way of knowing the District would not bill IHS or other insurance without an interpreter.

12. Except for this past year or so, the Navajo people have not complained of the bills before this time, so they must not have received them.

13. The bills I have seen are years old.

14. I have attended San Juan County Commission meetings where resolutions from the Navajo Chapters are ignored and not even kept in a file as a Commission record.

15. Aneth and Red Mesa Chapters stated the District's actions to Ms. Singer and Mr. Riggs had a direct and detrimental effect on the health and welfare of the Navajo people in written resolutions and these were ignored. Of course without a file the Commission can claim they never received them.

16. My constituents often speak only Navajo, do not know what a 'HICFA' number is that they need for

medicaid reimbursement, often have no phones and live many miles off main highways.

17. My constituents are often unfamiliar with the anglo language and anglo billing and court collection processes.

18. I suggested Roger Atcitty's name as the selection for the San Juan Health District governing board and it was accepted. Mr. Atcitty is a Navajo member.

19. The Chapter members and I have observed that Mr. Atcitty, as chairman of San Juan Health District, has wholly failed to represent the needs of his people on the San Juan Health District governance board, and have never heard of Mr. Atcitty challenging County or District officials, and appears more concerned with looking out for only his and his family and friends' own financial future and his own future economic and social ties than the needs of his people.

20. Significantly, when Mrs. Singer was wrongfully fired and falsely charged with fraud that was broadcast throughout the small San Juan County community to her everlasting detriment, Roger Atcitty's sister Brenda Brown became the new Montezuma Creek Clinic manager and is now the manager at Monument Valley.

21. I have observed that Mrs. Brown seems hard working, but my constituents report that she is unable to forcefully stand up to the San Juan Health District in behalf of the Navajo people getting bills and who are not being seen as Mrs. Singer would and could have had she remained manager of Montezuma Creek Clinic.

22. I have observed on numerous occasions that Cleal Bradford, CEO of San Juan Health Services

District, meets with the County Commissioners Ty Lewis and Bill Redd prior to and immediately after Commission meetings, and Bradford always leaves the room when I arrive, and reappears when I leave.

23. Mr. Bradford has appeared at County Commission meetings and had resolutions passed by Ty Lewis and Bill Redd without being on the agenda, some of these resolutions dealt with spending taxpayers' money.

24. In addition to the billing situation it is my testimony that I have observed the following acts of discrimination against the Navajo people who are my constituents for as long as I have been County Commissioner;

a. I speak and make comments, raise objections, and voice concerns and more often than not, these are not reported or sparsely reported in the Commission minutes. It is as if I am not really there.

b. Road contracts and building contracts go primarily to white contractors and the same persons for years at a time. Minority contractors who do win a bid must cross every t or dot every i to keep the contract, unlike the white contractors.

C. Chapter resolutions are seldom kept in a file and are ignored on a rather consistent basis.

d. It took over 25 years of Court litigation and fighting for San Juan County School District to come into compliance with their own consent decree wherein they were to provide equal educational opportunities for the Navajo children. This County's word means little or nothing for honesty.

e. Funds allocated for Navajo children were spent on non-Navajo sports teams equipment, leaving the Navajo children without.

f. The County receives Payment In Lieu of Taxes from the federal government for and in behalf of the Navajo people do not pay property taxes.

g. Many of the businesses in San Juan County are associated with federal and state funds that the County Commissioners have a strong hold over at the local and state level, and these funds seldom go to Navajo businesses, SO there is a loss of hope for any future development within the Navajo Nation boundaries.

h. The County has not spent money on road development, water development, recreational facilities, electrical development, or library development within the Navajo Nation areas to the equal extent they have spent money for these items in the Northern and less populated part of the County. The BLM roads are grated and drained for the most part Indian dirt roads are left without grading and drainage and several are impassible except for four wheel drive vehicles or even horses.

i. Children living on such roads find it nearly impossible to get to the bus stop on the highway due to snow or rain and often drop out of school at a very early age.

j. The suicide rate for Navajo children on the Utah strip is much higher than in the nearby anglo population.

k. Emergency vehicles often can not get down such undeveloped roads.

l. Economic, political and social intercourse is

thwarted by such roads.

m. Often the roads in the Utah strip have no guard rails and lethal roll overs are more common south of Blanding.

n. Criminal prosecutions of Navajo and minority people is greater than that of whites, even though the populations are nearly the same.

o. I have witnessed road blocks for drunk drivers just prier to entering the reservation, but seldom road blocks for drunk drivers for primarily nonIndian drivers going to Lake Powell or going hunting.

p. There is currently a court case several years old involving fair representation of Navajo people on juries I am aware as Commissioner that generally Navajos who may speak only Navajo are prosecuted by all white english speaking juries in Monticello, Utah and this practice is generations old.

q. It is my experience that San Juan County Commissioners run the San Juan Health District, and nearly every other special district in San Juan County by sifting on interlocking boards of special districts that are supposed to be separate body politics.

r. There is a clique of white people who are friends and relatives of Ty Lewis and Bill Redd, County Commissioners, that get selected for boards and any Navajos selected are those who did as they are told.

s. Nepostism is rampant in San Juan County.

t. Constituents have told me of the disrespect and lack of dignity they are treated with at San Juan Health

District facilities as well as, in the Courts, the Health District, and by County Attorney Craig Halls.

u. Significantly, a stiff fine or other financial penalty will drive a Navajo citizen back onto the reservation to live with relatives to avoid being sent to jail because he or she can not pay the fine. Such a practice makes the Navajo population smaller in the primarily white north part of the County.

v. Currently, it is Craig Halls who is obtaining bench warrants on many Navajo people, wherein they must post a $200 bond to prevent jail time, in regards to the bills from San Juan District. It is my information his daughter is working as the Court clerk

w. Overall, the racial and political discrimination against the Navajo in this County is well entrenched and is over a hundred years old, and I believe without well policed Court orders that demand immediate obedience, and confirmation of their obedience, and personal sanctions against the parties for disobedience, the Court cases will be left to be fought out for the next 25 years as the school case was, with direst injury to the Navajo people who are my constituents.

x. It is my information that San Juan Foundation is a non-profit organization who is formed for educational purposes and was initiated and is directed by Cleal Bradford. San Juan Foundation took over the Monument Valley Clinic facilities while Cleal Bradford was the head administrator for San Juan Health Service District, even though the San Juan Foundation as I understand it, is primarily formed for educational purposes. San Juan Foundation can become a private organization at any time, and I have been told there are several hundreds of thousands of federal dollars if not millions, in the

foundations' accounts.

y. Workers commonly told me that while Cleal Bradford was working for the Utah Navajo Development Council conjunction with the Utah Navajo Trust fund, prior to 1992 when the fund was nearly bankrupt, that workers building homes for Navajos for UNDC helped build Mr. Bradford's son's house and can be verified by a Utah State legislative audit. Mr. Bradford and his daughter wrote a book "Silent Thunder" Copyright 1974, he sold them for approximately $5.50, and published with UNTF money that can be proved by legislative audit.

z. I have also observed that the County powers will use malicious gossip and wide publication of false gossip against those who seek are in opposition to that If you are their enemy, they will retaliate in numerous ways

25. The San Juan County Sheriff recently terminated a recent academy graduate Navajo Sheriff Officer during the officer's probationary period by 1. . placing the Officer in a position he was not certified to perform in, and the Sheriff knew or should have known he was not properly certified to perform in, 2. without a written list of reasons for termination, 3. without warning and without a hearing, 4. in spite of letters of support in his behalf from the Navajo Community, 5. with untrue accusations the Officer could not respond to and 6. the Sheriff was arrogant and rude in dealings with me while I was investigating the matter. There is only one Navajo officer left on the Sheriff's force of over two dozen officers as estimated. This officer graduated from Whitehorse High School with the highest scholarship award. He has no police record I am aware of, and yet the Sheriff was accusing this officer of criminal activity

without naming the time, place, or witnesses the officer could challenge and confront with questions. I can not find any fair dealing of the County at any level, with this Officer.

26 The Commissioners' review of this Sheriff matter amounted to no review and further the Commissioners showed a total lack of concern for this situation

27. Recently I became aware of a situation at a local High School event, on state owned land, that was not policed, and a person was drunk. The school official had to police the event and the foregoing Navajo Officer often would police such events and the School misses this officer and stated as much to the County Commissioners.

28. With approximately half of the San Juan County population being Navajo, it is interesting to me to try to understand how a Navajo non-english speaking person can be arrested and read his rights when no one speaks Navajo except one person. Additionally, such a Navajo accused that is arrested may have a problem with communicating illness or other emergency needs while in jail.

29. At this time, I fully and openly support this Court ordering a full and complete GAO audit of all the federal funds coming into San Juan County and all San Juan Special Districts and all funds given to San Juan Foundation to examine if they are being spent in accordance to their grants, etc.

30. Further, I fully and openly support a complete Grand Jury investigation of the financial expenditures and bookkeeping of San Juan County, and all the San Juan Districts and any organizations, such as Quorum

Health Care and San Juan Foundation, that the San Juan County or San Juan Health District or other Special Districts has contracted with for management to fully and minutely examine the bookkeeping for these entities to set if federal and state funds have been mispent, and to find out how much of a fiction this County's budget may be.

31. It is my information that recently the County accountant, who relies upon the County for his livelihood has been made a San Juan Health District governance board member. I do not believe he will enjoy the luxury of exercising his independent judgment.

I, Mark Maryboy, being a duly elected San Juan County Commissioner, being duly sworn, hereby states under penalties of perjury that the forgoing statements are true to the best of my belief and knowledge.

NOTARY CERTIFICATE

County of San Juan
State of Utah

I Witnessed Mark Maryboy swear before me, having appeared with picture identification, under penalty of perjury, with his right arm raised, that the foregoing statements were true to the best of his information and belief and he did sign this document in my presence.

NOTARY PUBUC
My Commission expires on the 20th day of Sept. 2002

STAN JOHNSON
Notary Public

State of Utah
My. Comm. Expires Sep. 20, 2002
P.O. Box 304 Bluff, UT 84512

EW 169a

Case No. 2:00CV584K

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

DR. STEVEN MACARTHUR et al.,
Plaintiffs,

vs.

SAN JUAN COUNTY et al.,
Defendants.

October 30, 2000, Decided

COUNSEL:

For STEVEN MACARTHUR, Doctor, NATHANIEL PENN, Doctor, MICHELLE LYMAN, HELEN VALDEZ, CANDACE LAWS, PAUL KEITH, DOROTHY KEITH, LINDA CACAPARDO, SUE BURTON, AMY TERLAAK, ALISON DICKSON, CANDACE HOLIDAY, NICOLE ROBERTS, DONNA SINGER, FRED RIGGS, plaintiffs: Susan R. Schildmeyer, THE TAX LAW CENTER LLC, SOUTH JORDAN, UT.

For SAN JUAN COUNTY, J TYRON LEWIS, BILL REDD, CRAIG HALLS, MARK MARYBOY, RICHARD BAILEY, defendants: Michael W Homer, Jesse C Trentadue, Kathleen M. Liuzzi, Thomas B. Price, SUITTER AXLAND, SALT LAKE CITY, UT.

For FARMER'S/TRUCK INSURANCE, defendant: Kyle M Finch, MILLER STRATVERT TORGERSON & SCHLENKE PA, FARMINGTON, NM.

R. DENNIS ICKES, defendant, Pro se, SALT LAKE CITY, UT.

For FARMER'S/TRUCK INSURANCE, counter-claimant: Kyle M Finch, MILLER STRATVERT TORGERSON & SCHLENKE PA, FARMINGTON, NM.

For STEVEN MACARTHUR, NATHANIEL PENN, MICHELLE LYMAN, HELEN VALDEZ, CANDACE LAWS, PAUL KEITH, DOROTHY KEITH, LINDA CACAPARDO, SUE BURTON, AMY TERLAAK, ALISON DICKSON, CANDACE HOLIDAY, NICOLE ROBERTS, DONNA SINGER, FRED RIGGS, counter-defendants: Susan R. Schildmeyer, THE TAX LAW CENTER LLC, SOUTH JORDAN, UT.

JUDGES:
DALE A. KIMBALL, United States District Judge.

OPINIONBY:
DALE A. KIMBALL

OPINION:

MEMORANDUM DECISION AND ORDER

This matter is before the court on the San Juan County Defendants' (the "County Defendants") Motion to Dismiss Plaintiffs' Declaratory Judgment Claim with Prejudice Based on Sovereign Immunity, in which the San Juan Health Services District Defendants (the "Health District Defendants") have joined, n1 and also on Plaintiffs' Cross-Motion for Summary Judgment on the same issue. n2 A hearing on these motions was held on October 5, 2000. n3 At the hearing, the County Defendants n4 were represented by Jesse C. Trentadue, the Health District Defendants n5 were represented by Carolyn Cox, and Plaintiffs were represented by Susan R. Schildmeyer. Before the hearing, the court considered carefully the memoranda relating to these motions, along with Plaintiffs' original motion for a

temporary restraining order and the other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. BACKGROUND

The issue before the court is whether the County Defendants and the Health District Defendants (sometimes collectively referred to as "Defendants") were immune from suit in the Navajo Tribal Court (the "Tribal Court"), thereby precluding this court from enforcing the Tribal Court Orders against them.

A. THE TRIBAL COURT ORDERS

The Tribal Court action pertained generally to the Health District's operation of the Montezuma Creek Clinic (the "Clinic"), which is located within the exterior boundaries of the Navajo Reservation. n6 The Clinic, and the land on which it is located, is owned by the State of Utah as part of the Utah Navajo Trust Fund. The Clinic serves members of the Navajo Nation and is operated by the Health District pursuant to a contract with Indian Health Services ("IHS").

In the Tribal Court action, Defendants unsuccessfully argued that they were immune from suit. In ruling on the plaintiffs' application for a preliminary injunction, the Tribal Court found that Defendants had failed to show how a service district-a minor political subdivision-is an "arm of the state" with immunity under *Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999). See* Findings, Opinion and Judgment at Preliminary Injunction at (unnumbered) 9, dated December 28, 1999, attached as Exhibit 5 in Defendants'

Submission of Tribal Court Record. In addition, the Tribal Court found that Defendants had "failed to show how civil rights violations are given immunity when *Alden v. Maine* exempts those types of injuries from immunity . . . ." *Id.* The Tribal Court also found that Defendants had "failed to show how a minor political subdivisions [sic] [with] limited governmental authority exceeds that of the entire Navajo Nation sovereignty." *Id.* Based on these conclusions, among others, the Tribal Court entered a preliminary injunction on December 28, 1999, ordering Defendants to take several actions regarding the plaintiffs, such as reinstating them, paying lost income, expunging the charges against them, etc. *Id.* at (unnumbered) 20. In addition, the Tribal Court ordered that Defendants are prohibited from:

(a) Elimination of emergency medical technician services and coverage within the territorial jurisdiction of the Navajo Nation in service to the local Navajo and other Native American population for or on behalf of the Montezuma Creek Clinic;

(b) interfering with the lab services to the Montezuma Creek Clinic;

(c) interfering with the pharmaceutical services provided to the Montezuma Creek Clinic;

(d) interfering with any form of patient care, by among any other matter or things, billing IHS patients; and

(e) interfering or harassing Ms. Singer as the manager of the Montezuma Creek Clinic.

Id. at (unnumbered) 21. The Tribal Court further ordered Defendants "to assist the Clinic and the local Navajo Chapters and chapter government, by any means necessary including Navajo and Ute language

announcements on Navajo Nation wide radio; letter, etc. to help diabetic IHS patients to return to the clinic for treatment, including informing them that as an IHS patient, they do not have to directly pay for their health care treatment at the Montezuma Creek Clinic." *Id.* at (unnumbered) 22.

Additionally, on March 1, 2000, the Tribal Court signed an Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order. Although the Health District's contract with IHS to operate the Clinic had expired on December 31, 1999 and was not renewed, the Tribal Court, in the March 1, 2000 Order, restated its previous prohibitions and mandates from its December 28, 1999 Order, added further directives to Defendants, and imposed a fine of $ 10,000 a day for each day that the Order was not "carried out in its entirety." *See Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order* at 16, attached as Exhibit 12 in Defendants' Submission of Tribal Court Record. The Tribal Court also ordered that "every personal defendant and defendants[']counsel will pay $ 1,000 per day of the $ 10,000 daily fine from their own personal assets." *Id.*

II. DISCUSSION

A. THE COUNTY DEFENDANTS' ARGUMENTS

The County Defendants claim that they were immune from suit in the Tribal Court under the doctrine of sovereign immunity, and consequently they have urged the court to dismiss Plaintiffs' claim for declaratory relief pertaining to enforcement of the Tribal Court Orders. The County Defendants assert that, "as an arm of the State of Utah, San Juan County and its elected officials and employees are immune from suit in Navajo Tribal Court." The County Defendants point out

that the states, in joining the Union, did not surrender any of their sovereign immunity with respect to tribal governments. They also argue that persons or entities subject to tribal governance, including tribal courts, do not enjoy the due process and other rights and protections that are given to citizens under the United States Constitution. Thus, they claim that "Congress could not by treaty or statute permit tribal governments with dominion over state governments and/or their political subdivisions because to do so would be to deprive these entities of their constitutional rights." Because the Tribal Court's dominion, if any, over Defendants does not arise under the United States Constitution or the Acts of Congress, then the only source for such jurisdiction would be the Tribe's inherent sovereignty, which, Defendants contend, does not reach the State of Utah or its political subdivisions or their officers and employees.

Accordingly, Defendants contend that the common law, as well as the Utah Governmental Immunity Act ("UGIA"), render them immune from suit in the Tribal Court. Additionally, they argue that, to the extent that governmental immunity is waived as to any political subdivision or its employees or officials, the UGIA expressly restricts lawsuits against political subdivisions and their officials and employees to district courts of the State of Utah. *See* Utah Code Ann. § 63-30-16(1) (Supp. 2000).

The County Defendants also argue that Craig Halls ("Mr. Halls"), as the elected County Attorney, is an officer of the state because he prosecutes public offenses on behalf of the State of Utah, represents the State of Utah in civil cases, and assists the State as required by the Utah Attorney General. *See* Utah Code Ann. § 17-18-1(2) (1999). Thus, they argue, Mr. Halls enjoys the sovereign immunity of the state and the

Tribal Court's Orders are unenforceable against him. In addition, the County Defendants contend that the remaining County Defendants are immune because "counties as quasi municipal corporations partake under the common law of the sovereign immunity of the State, as an arm of the State" relying on *Shaw v. Salt Lake County, 119 Utah 50, 224 P.2d 1037 (Utah 1950).* They also claim that common law immunity also exists for public officers and employees performing discretionary acts or carrying out official policy. *Ross v. Schackel, 920 P.2d 1159, 1161-62.* (Utah 1996).

B. THE HEALTH DISTRICT DEFENDANTS' ARGUMENTS

The Health District Defendants have joined in the County Defendants' Motion to Dismiss, claiming that the Health District and its officers and employees were similarly immune from suit in the Tribal Court based on the state's retention of sovereignty and the UGIA. The Health District Defendants rely on the fact that, under the UGIA, the Health District is deemed a "governmental entity." They claim that the Health District was created in 1988 as a special service district, which, it claims, clearly falls within both the "special improvement district" and "public corporation" language of the UGIA. Further, they argue that Utah courts have held that such districts constitute governmental entities that fall within the UGIA, relying on *Lyon v. Burton 2000 UT 19, 5 P.3d 616, 621-23 (Utah 2000)* (county fire district entitled to governmental immunity).

In addition, the Health District Defendants claim that they are immune because the UGIA provides immunity for the Health District's actions that involve the exercise of governmental functions. They point out that the UGIA specifically provides that a governmental entity is

immune from suit for any injury that results from the operation of a hospital or health care facility.

The Health District Defendants also claim that the individual defendants who are employees of the Health District are entitled to immunity, unless the acts were undertaken with fraud and malice, which, they ostensibly contend, the acts were not. Finally, they claim that, even if immunity was waived, suit may only be brought in state district courts–not in tribal courts.

C. PLAINTIFFS' ARGUMENTS

Plaintiffs offer numerous arguments why Defendants were not immune from suit in the Tribal Court. They argue that, under *Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)*, states have consented to be sued for constitutional and federal law violations. They also claim that the doctrine of claim preclusion precludes any rehashing of the immunity issue or the jurisdiction issue, arguing that this court should not "second guess" the Tribal Court.

Plaintiffs also argue that Defendants are not arms of the state and that the County and Health District have failed to address the Tenth Circuit's analysis of the "arm-of-the-state" doctrine. *See, e.g., Sturdevant v. Paulsen, 218 F.3d 1160 (10th Cir. 2000)* (setting forth and applying test to determine whether a State Board for Community Colleges and Occupational education was an arm of the state). Plaintiffs contend that the County and the District are not arms of the state "because they are not represented in this action by the Utah Attorney General's Office, their judgments are not paid by the State fisc and risk management office, [they can] sue and be sued, own and alienate land, and enter freely into contracts." Thus, Plaintiffs contend that, because the

County and Health District are not arms of the state, they are not entitled to sovereign immunity.

Moreover, Plaintiffs claim that "immunity fails by the *Strate* analysis," referring to *Strate v. A-1 Contractors, 520 U.S. 438, 117 S. Ct. 1404, 137 L. Ed. 2d 661 (1997)*, and contend that, under *Strate*, the Navajo Nation "retain[s] inherent sovereign power to exercise some form of civil jurisdiction over non-Indians on their reservations, even on fee lands." Accordingly, they argue, "the immunity argument is irrelevant."

In sum, Plaintiffs claim that "no authority exists for minor political subdivisions to override the Treaty and their congressional enactments," that "no statutory authority exists for this Court to circumscribe the inherent powers of the Navajo Court," and that, "because a Treaty preserves them, this District Court has an affirmative obligation to enforce them." Plaintiffs also argue that, because the Tribal Court was protecting its own authority (from the bad faith conduct toward the court), there is no immunity for this set of wrongful acts.

Even if Defendants were immune, Plaintiffs claim that Defendants waived their immunity when they filed counterclaims and participated in the Tribal Court proceedings. Plaintiffs also argue that Mr. Halls did not raise the immunity defense "with specificity," and thus he waived his immunity. Finally, they argue that, because Mr. Halls was acting outside his authority, he had no immunity.

D. ANALYSIS

This court has jurisdiction pursuant to *28 U.S.C. § 1331* to determine whether a tribal court has exceeded the limits of its jurisdiction. *Strate, 520 U.S. 438 at 448, 137 L. Ed. 2d 661, 117 S. Ct. 1404.* When

reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts' findings of fact for clear error and conclusions of law *de novo*. n7 *Atkinson Trading Co., Inc. v. Shirley, 210 F.3d 1247, 1250-51 (10th Cir. 2000); see also Strate, 520 U.S. at 449.* The immunity issue addressed by this court is a purely legal issue, which is reviewed *de novo*.

Sovereign immunity is a common law doctrine that precludes litigation against an unconsenting government. *See, e.g., Montana v. Gilham, 932 F. Supp. 1215, 1219 (D. Mont. 1996)* (citing Restatement (Second) of Torts § 895B)), *aff'd, 133 F.3d 1133 (9th Cir. 1997).* This court is not aware of any published case that has addressed the issue of whether political subdivisions of a state are immune from suit in a tribal court. The most analogous published case involves the question of whether a *state* is immune from suit in tribal court. In *Montana v. Gilham, 133 F.3d 1133 (9th Cir. 1997),* the State of Montana brought a declaratory judgment action in federal court to determine the enforceability of a judgment entered against it in the Blackfeet Tribal Court.

The *Gilham* case arose out of a fatal automobile accident that occurred when a car driven by a tribal member struck a state highway sign. Montana asserted immunity as a defense, but the tribal court entered judgment in favor of the plaintiff, and the Tribal Court of Appeals affirmed. The district court determined that Montana was immune from suit in tribal court. *See 932 F. Supp. 1215, 1224 (D. Mont. 1996).* The Ninth Circuit affirmed, stating that "tribal courts historically did not possess and have not retained sovereign powers over States" and that the power to subject other sovereigns to suit in tribal court was simply not a part of the tribe's inherent sovereignty." *133 F.3d at 1137-38.* The Ninth Circuit noted that "courts will find that a State has

waived its Eleventh Amendment immunity only where stated by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Id. at 1139* (internal quotations omitted). Because the language of Montana's Constitution did not meet that standard, the *Gilham* court found that Montana had not waived its immunity from suit in federal court, and that "for similar reasons, Montana has not waived its immunity from suit in tribal court. Indeed, given the standard to find a waiver, the only reasonable construction of the [Montana Constitution] is that Montana has consented to suit only in its own state courts." *Id.*

In the instant case, this court agrees with the reasoning of the Ninth Circuit in *Gilham* that tribal courts historically did not possess and therefore have not retained sovereign powers over states. Therefore, absent a state's express waiver of immunity, a state cannot be sued in tribal court. In addition, as explained below, this court finds that the same reasoning applies to a state's political subdivisions. Consequently, political subdivisions of the State of Utah, as defined by Utah law, are immune from suit in tribal courts because the State of Utah has not waived the common law immunity of its political subdivisions from suit in tribal courts.

The United States Supreme Court has made clear that "the Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Alden v. Maine, 527 U.S. 706, 727, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)* (quoting *Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 239 n.2, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985))*. The Supreme Court has repeatedly emphasized that point.

For example, in *Monaco v. Mississippi, 292 U.S. 313, 78 L. Ed. 1282, 54 S. Ct. 745 (1933)*, the Court stated:

"It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is not enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the convention it will remain with the States . . . ."

Id. at 324 (quoting The Federalist No. 81, p. 487).

The Court has also explained that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." n8 *Alden v. Maine, 527 U.S. 706, 728, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)*. Thus, because "the Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle, it follows that that immunity's scope is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id. at 728-29*. In other words, the Eleventh Amendment stands "not so much for what it says, but for the presupposition . . . which it confirms." *Blatchford v. Native Village of Noatak, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991)*.

The Constitution's structure and history, and the interpretations of the Supreme Court, make clear that "the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States)

except as altered by the plan of the Convention or certain constitutional Amendments." *Alden, 527 U.S. at 713.* Accordingly, there is a "presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution–anomalous and unheard of when the constitution was adopted." *Alden. 527 U.S. at 727* (quotations and citations omitted). Therefore, the Court has "looked to the history and experience, and the established order of things, rather than adhering to the mere letter of the Eleventh Amendment in determining the scope of the States' constitutional immunity from suit." *Id.*

States have impliedly consented to suit in the "plan of the convention." *See Blatchford, 501 U.S. at 781.* Under the "plan of convention" theory, states are deemed to have impliedly waived some of their sovereignty when they ratified the Constitution. *See Monaco v. Mississippi, 292 U.S. 313, 322-23, 54 S. Ct. 745, 78 L. Ed. 1282.* The theory recognizes that, in order for the constitutional system to function, a relationship of reciprocal rights and responsibilities was necessarily imposed upon the states when they joined the Union. The states ceded some aspects of their sovereign immunity to the federal government, but they did not relinquish their sovereign immunity as against entities other than the United States and sister states. *See Blatchford, 501 U.S. at 781.* As a result, a state's implicit waiver of sovereign immunity as to suits by the United States or "sister states" is predicated upon the "mutuality of concession" inherent in the formation of the Union. n9 *Id.; see also Alden, 527 U.S. at 749* ("the immunity of one sovereign in the courts of another has often depended in part on comity or agreement.")

However, the Supreme Court determined in *Blatchford v. Native Village of Noatak* that "there is no such mutuality with either foreign sovereigns or Indian

Tribes." *501 U.S. 775 at 782, 111 S. Ct. 2578, 115 L. Ed. 2d 686.* The Court recognized that "what makes the States' surrender of immunity from suit by sister States plausible **[*23]** is the mutuality of that concession." *Id.* The *Blatchford* Court further explained that Indian tribes enjoy immunity against suits by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties." *Id.* But, "if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes." *Id.*

Although the *Blatchford* Court was addressing a different question than that presented to this court, it stands to reason that, if states cannot be sued by Indian tribes in a state's own courts, then tribal members certainly cannot sue a state in tribal court. This is particularly true when tribal courts do not recognize the Constitutional protections that are guaranteed to citizens and entities of the United States. Consistent with Supreme Court precedent and the Ninth Circuit's analysis in *Gilham*, this court agrees that a state, unless it has consented to such a suit, cannot be sued in tribal court. While the State of Utah surrendered some of its common law immunity as a member of the United States–based upon a mutuality of concession–there is no indication whatsoever that the State of Utah ever waived its common law immunity to suit in tribal courts.

The question in the instant case, then, is whether Defendants possess the same immunity as the State of Utah. In *Gilham*, the court looked to Montana's Constitution and state law to determine whether it had waived immunity from suit in tribal court. *See 133 F.3d at 1139.* This court also finds it appropriate to look to Utah state law to determine whether Defendants enjoy the same immunity as the State of Utah and also

whether the State of Utah has waived the immunity of Defendants from suit in tribal court.

Utah law is clear that political subdivisions enjoy the same immunity possessed by the State of Utah. *See* Utah Code Ann. § 60-30-2, -3. Political subdivisions are defined as "any county, city, town, school district. . . . special improvement or taxing district, or other governmental subdivision, or public corporation." *Id.* § 63-30-2(7). Governmental entities. which are defined as "the state and its political subdivisions as defined by this chapter," *Id.* § 63-30-2(3), are, unless otherwise provided in the UGIA, "immune from suit for any injury which results from a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility . . . ." *Id.* § 63-30-3(1). n10

A state may expressly waive its sovereign immunity through legislative enactments that intentionally relinquish the state's immunity. *See Edelman v. Jordan, 415 U.S. 651, 673, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974).* The State of Utah has expressly waived its sovereign immunity--and also the immunity of its political subdivisions--regarding certain claims, such as contractual obligations, actions involving property, and certain negligence actions, to name a few. *See* Utah Code Ann. § § 63-30-5, -6, -10. Accordingly, Utah has consented to be sued in its own courts for such claims. *Id.* § 63-30-16.

However, a state's waiver of immunity in its own courts is not a waiver of its Eleventh Amendment immunity in federal court. *Edelman, 415 U.S. at 677 n.19* ("Whether [the State] permits such a suit to be brought against the State in its own courts is not determinative of whether [it] has relinquished its Eleventh Amendment immunity from suits in the federal courts."); *Pennhurst State School & Hosp. v.*

Halderman, 465 U.S. 89, 99, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) ("A State's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued."). Accordingly, it is axiomatic that a state's waiver of immunity in its own courts is not a waiver of its sovereign immunity in tribal courts.

In the case at bar, there is nothing in the record or in the laws of the State of Utah to suggest that Utah has waived the sovereign immunity of its political subdivisions and thus consented to their being sued in tribal court. Unless sovereign immunity is waived, it is retained.

Further supporting the conclusion that Utah's political subdivisions are immune from suit in tribal courts is the fact that there has been no mutuality of concession with Indian tribes, as there was when the states surrendered some of their immunity to the federal government. Not only are tribes generally immune from suit, absent their consent, *see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978)*, but subordinate economic organizations of a tribe are also clothed with tribal immunity. *See Dixon v. Picopa Constr. Co., 160 Ariz. 251, 772 P.2d 1104, 1108 (Ariz. 1989)* ("The subordinate economic organization doctrine allows Indian tribes to conduct their economic affairs through subordinate governmental agencies without fear of an unintended waiver of immunity."); *White Mountain Apache Indian Tribe v. Shelley, 107 Ariz. 4, 480 P.2d 654, 656 (Ariz. 1971)* (finding that absent waiver, subordinate economic organization of Indian tribe enjoyed same immunity from suit that tribe enjoyed); *Snowbird Constr. Co., Inc. v. United States, 666 F. Supp. 1437, 1441 (D. Idaho 1987)* ("The attributes of tribal sovereignty generally extend to a housing authority,

established by a tribal council pursuant to its powers of self-government.").

It would be nonsensical–in the absence of any mutuality of concession–to conclude that a political subdivision of a state is subject to suit in a tribal court when subordinate tribal governmental agencies are immune from suit in state courts. Moreover, it would be a ludicrous result if tribal members could sue political subdivisions in tribal court for claims for which no other citizen of the entire country could sue. For example, in the Tribal Court action filed by some of the Plaintiffs in the instant case, the plaintiffs alleged a claim for defamation. No other citizen in the entire nation could successfully allege such a claim against Defendants because the UGIA retains Defendants' immunity for such claims. *See* Utah Code Ann. § 63-30-10(2). There is simply no basis for finding that tribal members can sue political subdivisions of the State of Utah in tribal court when that option is not available to any other individual in the United States.

Plaintiffs' arguments, which are based largely on the Tribal Court's erroneous conclusions of law, fail to convince the court otherwise. First, Plaintiffs' reliance on *Alden v. Maine, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999)* is misplaced. The *Alden* case involved a suit brought by state probation officers against the State of Maine for violations of overtime provisions of the Fair Labor Standards Act. The Court held that Congress could not subject a state to suit in a state court without its consent. *Id. at 759-60. Alden* would be applicable only if it pertained to Congress subjecting a state to suit in tribal court.

Plaintiffs, relying on the Tribal Court Orders, correctly argue that the *Alden* Court noted that "lesser entities" of states, such as municipal corporations that are not arms of the state, are not immune from suit

under the Eleventh Amendment. *See id. at 756.* However, the issue in the instant case is not an Eleventh-Amendment issue, i.e., this court is not faced with a question of whether a political subdivision of a state can be sued in federal court or whether Congress can abrogate the immunity of such political subdivisions. Accordingly, Alden's instruction on this issue is inapplicable to this case, and Plaintiffs' claim that Defendants' failed to even conduct an "arm of the state" analysis is groundless. *Alden* is relevant only to the extent that it provides a comprehensive history of sovereign immunity and the presuppositions behind the Eleventh Amendment.

Plaintiffs also argue that issue preclusion bars review of the Tribal Court's conclusions and that this court cannot second-guess the Tribal Court. However, as stated above, according to the United States Supreme Court, it is entirely appropriate for this court to review the Tribal Court's legal conclusions regarding whether it had jurisdiction over the Defendants.

Plaintiffs' argument that *Strate v. A-1 Contractors, 520 U.S. 438 (1997)* compels the conclusion that "immunity" is irrelevant is also erroneous. The Court in *Strate* provided an analysis of circumstances in which a tribal court can exercise subject matter jurisdiction in a civil case over the activities of non-Indians on non-Indian land within a reservation. *See id. at 439-41.* Quite obviously, the *Strate* Court did not determine that its subject-matter-jurisdiction analysis would apply even to parties that were immune from suit.

In addition, Plaintiffs claim that "no authority exists for minor political subdivisions to override the Treaty [presumably of 1868] and their congressional enactments." However, Plaintiffs have not provided any authority for the proposition that any treaty or congressional enactment abrogates a state's or its

political subdivision's immunity. Plaintiffs also mistakenly claim that, because the Tribal Court was protecting its own authority (from the bad faith conduct toward the court), there is no immunity for this set of wrongful acts. There is simply no authority for such a proposition.

Even if Defendants were immune, Plaintiffs claim, that immunity was waived by filing a counterclaim in the Tribal Court. However, the Tenth Circuit has made clear that when a defendant continued to assert its immunity, the filing of a counterclaim did not destroy that immunity. *See Mescalero Apache Tribe v. New Mexico, 131 F.3d 1379 (10th Cir. 1997).* In this case, the filing of a counterclaim similarly did not destroy immunity.

Regarding the individual County Defendants and Health District Defendants in the Tribal Court action, this court finds that they were also immune. The UGIA provides that:

An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority, unless it is established that the employee acted or failed to act due to fraud or malice.

Utah Code Ann. § 63-30-4(4). In this case, neither of the governmental entities can be liable, and thus, the individuals cannot be liable in their official capacities. n11 Furthermore, because there is no finding of fraud or malice in the Tribal Court's Orders, the individuals cannot be liable in their individual capacities. n12

III. OTHER ISSUES IN THIS CASE

Pursuant to the court's instructions at the August 22, 2000 hearing on Plaintiffs' motion for a temporary restraining order, Defendant Truck Insurance Company has filed a "Brief Regarding Subject Matter Jurisdiction, Full Faith and Credit, Comity, and Exhaustion," which will be treated as a motion to dismiss Plaintiffs' declaratory judgment claim against Truck. Defendant R. Dennis Ickes has also filed a memorandum on the same issues, which will also be treated as a Motion to Dismiss Plaintiffs' declaratory judgment claim against him. Plaintiffs, on October 26, 2000, filed a "Memorandum of Facts and Law in Support of Plaintiffs' Summary Judgment Motion for Declaratory Judgment and Writ of Mandamus Orders and Rebuttal to the Defendants Counterclaims," which is presumably in response to Truck's and Ickes' briefs. The parties are hereby notified that a hearing will be held on these three motions on November 17, 2000 at 10:00 a.m. The hearing is scheduled for 90 minutes. Truck and Ickes may–but are not required to–file reply memoranda supporting their motions to dismiss and opposing Plaintiffs' summary judgment motion no later than November 10, 2000.

In addition, Plaintiffs recently filed a motion to stay the preliminary injunction proceedings, except for the portion pertaining to enforcement of the Tribal Court Orders. Plaintiffs also requested an expedited hearing. All Defendants, including Truck and Ickes, if they choose to respond, should do so no later than November 10, 2000. Plaintiffs may then file a reply brief no later than November 15, 2000. This motion will be addressed at the November 17, 2000 hearing.

Finally, the Defendants have informed the court that there are various other legal issues regarding why this court cannot grant the relief requested in Plaintiffs' preliminary injunction motion, which issues should be

addressed prior to holding an evidentiary hearing on that motion. Depending on the result of Plaintiffs' motion to stay proceedings on the preliminary injunction motion, a briefing schedule regarding all other legal issues pertaining to the preliminary injunction motion will be set at the November 17, 2000 hearing.

IV. CONCLUSION

For the foregoing reasons and good cause appearing, it is hereby ORDERED that the County Defendants' Motion to Dismiss is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against the County Defendants is DISMISSED; the Health District's Motion to Dismiss is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against the Health District Defendants is DISMISSED; and Plaintiffs' Cross-Motion for Summary Judgment is DENIED. Plaintiffs' motion for a preliminary injunction n13 is DENIED to the extent that it requests enforcement of the Tribal Court Orders against Defendants.

However, because Plaintiffs have sought injunctive relief regarding the Health District's billing practices (a claim separate from their request to enforce the Tribal Court Orders), the Health District remains enjoined from pursuing collection efforts against any named Plaintiff--as set forth in the Order dated September 5, 2000--until the court resolves this specific issue, either on motions or after an evidentiary hearing.

A hearing on the arguments of Defendants Truck and Ickes, pertaining to the enforceability of the Tribal Court Orders against them, is set for November 17, 2000 at 10:00 a.m., at which time, Plaintiffs' motion to stay the

preliminary injunction proceedings will also be addressed, after briefing as set forth herein.

DATED this 30th day of October, 2000.

BY THE COURT:

DALE A. KIMBALL

United States District Judge

n1 The Health District Defendants joined in the motion to dismiss in their Memorandum in Opposition to Motion for Preliminary Injunction.

n2 The precise posture of these motions is that they arose in connection with Plaintiffs' motion for a temporary restraining order. Part of the relief requested in that motion was for this court to enforce the Orders entered by the Navajo Tribal Court, which were entered within the past year against most of the Defendants in the instant case. At the August 22, 2000 hearing on Plaintiffs' request for a temporary restraining order, the County Defendants and Health District Defendants notified the court that they believed that this court could not enforce the Tribal Court Orders against them because, among other reasons, they were immune from suit in the Tribal Court. All of the Defendants (including Truck/Farmer's Insurance Company and R. Dennis Ickes) also argued that the Tribal Court Orders are unenforceable for a variety of other reasons, including that the Tribal Court did not have subject matter jurisdiction over them, that the Orders are not entitled to full faith and credit, and that this court should not enforce the Tribal Court Orders under principles of comity. This court then requested briefing on these legal issues and set a hearing for October 5, 2000. Plaintiffs' motion for a temporary restraining order was denied, except that the Health District was ordered to suspend

their collection efforts pertaining to any named Plaintiff. In an Order dated September 29, 2000, the October 5, 2000 hearing was limited solely to the County Defendants' and Health District Defendants' argument pertaining to immunity. The other Defendants' arguments pertaining to the alleged unenforceability of the Tribal Court Orders will be addressed in the near future, as set forth at the end of this Memorandum Decision and Order.

n3 At the hearing, Plaintiffs submitted the Affidavit of San Juan County Commissioner Mark Maryboy. The County Defendants and Health District Defendants objected based on their contention that the law firm of Suitter Axland represents Mr. Maryboy, and thus Plaintiffs's counsel should not have communicated with Mr. Maryboy directly. Plaintiffs' counsel claimed that Mr. Maryboy initiated the contact. On October 11, 2000, counsel for Plaintiffs filed the affidavit with the court, with a proper caption. In light of the court's ruling contained herein, the oral motions to strike the affidavit are moot.

n4 The County Defendants include San Juan County; San Juan County Commissioners J. Tyron Lewis, Mark Maryboy, and Bill Redd; San Juan County Attorney Craig Halls; and San Juan County Administrator Richard Bailey. In the Complaint filed in the Tribal Court, these individual defendants were named in both their official and personal capacities, except for Mark Maryboy, who was named in his official capacity only.

n5 The Health District Defendants include the San Juan Health Service District, Cleal Bradford, Roger Atcitty, John Lewis, John Housekeeper, Karen Adams, Patsy Shumway, Dr. James Redd, Dr. Lloyd Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Gary Holliday, Lori Wallace, Carla Grimshaw, Gloria Yanito, Julie Bronson, and Laurie Schafer. In the Complaint

filed in the Tribal Court, not all of the individual Health District Defendants were named. The individual Health District Defendants in the Tribal Court action–and thus the individuals to whom this Memorandum Decision and Order pertains–were Roger Atcitty, John Lewis, Karen Adams, Patsy Shumway, and Laurie Schafer. These individuals were named in both their official and personal capacities, except for Patsy Shumway, who was named in her official capacity only.

n6 In their Tribal Court Complaint, the plaintiffs (who do not include all Plaintiffs in the instant case) alleged claims for (1) violation of their right to free speech, (2) violation of their right to assemble, (3) violation of their due process rights, (4) wrongful hiring, (5) defamation and tortious interference with contractual relations, (6) theft (of reputation), (7) violation of their equal protection rights, (8) intentional and negligent infliction of emotional distress, (8) breach of fiduciary duties, (9) misfeasance, and (10) malfeasance in office.

n7 Typically, courts must follow a deferential exhaustion rule that gives examination of the jurisdictional question in the first instance to the tribal court system. *Strate, 520 U.S. at 448-49 & n.7.* Thus, a party can challenge in federal court a tribal court's assertion of jurisdiction only after that party has exhausted the remedies available in the tribal court system, unless an assertion of tribal jurisdiction is "motivated by a desire to harass or is conducted in bath faith, or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *Id.* n.7 (quotations and citation omitted); *Atkinson, 210 F.3d at 1250.* In the instant case, tribal exhaustion is not at issue because Plaintiffs–not Defendants–filed suit in this

court, requesting, among other things, that this court enforce the Tribal Court Orders. In fact, the Tribal Court granted leave to seek enforcement of the Orders "as appropriate in any Utah or federal court where it will be enforced pursuant to principles of comity and applicable law." Special Order in Aid to Satisfaction of Preliminary Injunction at (unnumbered) 2, attached as Exhibit 9 to Defendants' Submission of Tribal Court Record.

n8 The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. Amend. XI.

n9 In addition, states have consented to some suits pursuant to subsequent constitutional Amendments, such as the Fourteenth Amendment. For example, in adopting the Fourteenth Amendment, the people required the states to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting states pursuant to its section 5 enforcement power. *See Alden, 527 U.S. at 756.*

n10 A "governmental function" means "any act, failure to act, operation, function, or undertaking of a governmental entity whether or not the act, failure to act, operation, function, or undertaking is characterized as governmental, proprietary, a core governmental function, unique to government, undertaken in a dual capacity, essential to or not essential to a government or governmental function, or could be performed by private enterprise or private persons." Utah Code Ann. § 63-30-2(4)(a).

n11 Plaintiffs argue that Mr. Halls waived his immunity defense by failing to raise it in the Tribal Court. The court finds no merit in this argument because there is clearly an immunity defense raised in Defendants' Answer in the Tribal Court.

n12 Plaintiffs claim that "Mr. Hall[s] was not acting within his authority," but offer no support. Aside from Mr. Halls, Plaintiffs did not specifically address arguments related to the individual defendants, in either their official or individual capacities.

n13 Plaintiffs' Application for a Temporary Restraining Order has been converted into a motion for a preliminary injunction.

EW 195a

Case No. 2:00CV584K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DISTRICT

DR. STEVEN MACARTHUR et al.,
Plaintiffs,

vs.

SAM JUAN COUNTY et al.,
Defendants.

Dated December 12, 2000
Filed December 13, 2000

MEMORANDUM DECISION AND ORDER

This matter is before the court on (1) the legal issues pertaining to whether the Tribal Court Orders should be enforced against Defendants Truck Insurance Company ("Truck") and R. Dennis Ickes ("Mr. Ickes"), fn1 (2) Plaintiffs' Motion for reconsideration, and (3) Plaintiffs' Motion for Declaratory Judgment. A hearing on the legal issues pertaining to enforcement of the Tribal Order was held on November 17, 2000, and the remaining motions have been decided without oral argument. At the hearing, R. Dennis Ickes represented himself, Kyle Finch represented Truck Insurance Company ("Truck"), Kathleen M. Liuzzi represented the County Defendants, Carolyn Cox represented the Health District Defendants, and Susan R. Schildmeyer represented Plaintiffs. Before the hearing, the court considered carefully the memoranda relating to these motions and the other materials submitted by the parties. Since taking the matter under advisement, the court has further

considered the law and facts relating to these motions, as well as the briefs that have been filed since the hearing. Now being fully advised, the court renders the following Memorandum Decision and Order.

1. LEGAL ISSUES PERTAINING TO WHETHER THE TRIBAL COURT ORDERS ARE ENFORCEABLE AGAINST TRUCK OR MR. ICKES

A. BACKGROUND

The background of this case in general has already been set forth in this court's Order dated October 30, 2000 ("October 30 Order"). The background set forth herein pertains specifically to Truck and Mr. Ickes' involvement in the Tribal Court action. The Complaint filed in the Tribal Court originally sought relief against San Juan County, the San Juan Health Services District, and various individuals. Along with their Complaint, Plaintiffs also filed an Application for Preliminary Injunctive and Temporary Relief, and the Tribal Court entered a temporary restraining order on the same date. Neither Truck nor Mr. Ickes was named as a party.

However, at the time in question, April 1999, there was in effect a Comprehensive Hospital Liability Policy issued by Truck, which, among other things, covered the Montezuma Creek Clinic, which was operated by the San Juan Health Services District ("Health District"). Consequently, Truck retained Mr. Ickes to represent the District and related defendants (the "Tribal Court Defendants") in the Tribal Court action. Because, there were coverage issues as to many of the claims brought by Plaintiffs in the Tribal Court proceedings, however, Mr. Ickes was retained solely to represent the interests of Truck's insureds. Mr. Ickes was not retained to, and

has not, represented Truck at any time pertinent to this action.

Upon motion of the Tribal Court Defendants, the Tribal Court dissolved the Restraining Order on May 14, 1999, apparently based at least in part on Mr. Ickes' arguments regarding Sampson v. Murray, 415 U.S. 61 (1964). On that date, the Tribal Court also began a preliminary injunction hearing. On December 28, 1999, the Tribal Court issued a preliminary injunction, ordering the Tribal Court Defendants to take several actions, which are set forth in the court's October 30 Order. In addition, the Tribal Court found that the Tribal Court Defendants and their counsel, Mr. Ickes, had engaged in bad faith conduct toward the court. Although it is not entirely clear which of the findings of bad conduct pertain to Mr. Ickes, it appears that the Tribal Court found misrepresentations of fact and law, spoliation of evidence, submission of evidence at the end of the preliminary injunction hearing, failure to plead fraud with specificity in the Tribal Court Defendants' counterclaims, and other unspecified violations of the Navajo Nation Rules of Civil Procedure.

On January 18, 2000, the Tribal Court Defendants filed a Motion to Dissolve or Modify Findings, Opinion and Judgment at Preliminary Injunction, arguing that it must be dissolved for lack of due process to Defendants, among other things. On January 27, 2000, Plaintiffs filed a Motion to Supplement the Pleadings in the case, seeking to add Mr. Ickes and Farmer's Insurance Companies and Truck Insurance Companies (collectively referred to as "Truck") as defendants in the action. Plaintiffs asserted claims against them for obstruction of justice, misuse of judicial process, defamation, denial of due process, denial of equal protection, and endangerment of Navajo patients at the

Clinic. Plaintiffs claimed that Truck was responsible for Mr. Ickes' conduct through legal theories of agency. Plaintiffs requested that the Tribal Court order Mr. Ickes and Truck, jointly and severally, to pay $1 8,000,000 to Plaintiffs and $6.000,000 to the Clinic.

On February 23, 2000, the Tribal Court entered an Order granting Plaintiffs' Motion to Supplement the Pleadings. On March 1, 2000, the Tribal Court entered an Order denying the Tribal Court Defendants' Motion to Dissolve, again making references to their bad faith conduct in the proceedings. The Tribal Court also ordered that the Preliminary Injunction Order be carried out immediately, and no later than March 3, 2000, and imposed a fine of $10,000 a day for each day that the Order was not carried out in its entirety. In addition, the Tribal Court ordered that "every personal defendant and defendants[']' counsel will pay $1,000 per day of the $10,000 daily fine from their own personal assets."

On March 6, 2000, the court entered a Special Order in Aid to Satisfaction of Preliminary Injunction, ordering, among other things, that the Tribal Court Defendants (presumably including Truck and Mr. Ickes) be restrained from alienating money or personal property until they paid the relief granted in the Preliminary Injunction Order and that they submit a listing of their assets to Plaintiffs. The court also stated that Plaintiffs could seek comity in the Utah and federal courts.

On March 15, 2000, Plaintiffs filed with the Tribal Court a Motion for All Defendants to be Bound by the Preliminary Injunction Order, seeking to bind the newly added defendants, Truck and Mr. Ickes. On April 27, 2000, without notice or an opportunity to be heard, the Tribal Court entered an Order Mandating that All Defendants be Bound by the Preliminary Injunction

Order In that Order, the Tribal Court held that Mr. Ickes and Truck were bound in privity with the other defendants and that they had "responsibility for all legal liabilities incurred by the defendants as declared in the December 28 Preliminary Injunction Order."

On June 12, 2000, Truck filed a Motion to dismiss Plaintiffs' claims against it based on the fact that Mr. Ickes had been hired under a reservation of rights and was not acting as Truck's agent in the tribal proceeding and therefore Truck could not be held liable for any misconduct of Mr. Ickes and because, as a matter of policy, a party should not be allowed to sue an adverse party's attorney. After Plaintiffs failed to file a timely response, the Tribal Court entered an Order dismissing Truck, but without substantively ruling on Truck's motion. Apparently, the judge indicated that he would issue an Order clarifying whether the dismissal was with or without prejudice; however, he has not yet done so. Based upon conversations with the court clerk, Truck believes that the dismissal will be without prejudice, and Plaintiffs have again filed a motion in Tribal Court to join Truck as a Defendant in the proceedings and bind it to the Tribal Court's prior Orders.

B. DISCUSSION

Both Truck and Mr. Ickes argue that the Tribal Court did not have jurisdiction over them, and thus, this court cannot enforce the Tribal Court Orders against them. fn2 In addition, they argue that even if the Tribal Court did not have subject matter jurisdiction over them, this court should not, under principles of full faith and credit or comity, enforce the Tribal Court Orders. Among other arguments, Mr. Ickes also argues that, as an attorney, he was immune from suit. Plaintiffs, however, adamantly disagree with all of Truck's and Mr. Ickes' arguments.

As a preliminary matter, both Truck and Mr. Ickes argue that exhaustion does not apply in this case. First, it is not a jurisdictional prerequisite. See Iowa Mutual Ins. Co. v. LaPlante, 480 U.S. 9, 16 n.8 (1987). Thus, there are several exceptions to the requirement. For example, there are exceptions when the assertion of jurisdiction was motivated by a desire to harass or conducted in bad faith, where the action was patently violative of express jurisdictional prohibitions, or where exhaustion would be futile. National Farmers, 471 U.S. at 857 n.21. There is also an exception when the requirement would serve no purpose but for delay. Strate V. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997). Similarly, the Ninth Circuit has found that exhaustion is not required when tribal court jurisdiction did not exist under Montana v. United States, 450 U.S. 544 (1981) and Strate, 520 U.S. at 459. Burlington Northern R.R. Co. v. Red Wolf, 196 F.3d 1059, 1065 (9thCir.), cert. denied,)__U.S.__, 120 S. Ct. 1964 (2000); see also Hornell Brewing Co. v. Rosebud Sioux Tribal Court, 133 F.3d 1087, 1093 (8th Cir. 1998) (exhaustion not required where court clearly lacked jurisdiction because there was no on-reservation conduct by defendant).

In this case, the court has previously found that exhaustion is not required because Plaintiffs—not Defendants—brought this action in federal court, after the blessing of the Tribal Court judge. See October 30 Order at 9 n.7. In addition, the court finds that, because the Tribal Court clearly lacked jurisdiction over both Truck and Mr. Ickes, as discussed below, exhaustion is not necessary. Furthermore, the court finds that exhaustion would be futile and would serve no purpose but for delay.

1. Truck

a. Subject Matter Jurisdiction

It is well-established that a tribe's jurisdiction will not extend to non-Indian conduct beyond the reservation's borders. See Hornell, 133 F.3d at 1093. In the Tribal Court action, Truck had not engaged in any conduct within the boundaries of the Navajo Nation. The claims against Truck are based solely on the conduct of Mr. Ickes. However, Mr. Ickes was never an agent of Truck in the Tribal Court proceedings, and Mr. Ickes' conduct was therefore not the conduct of Truck. Truck did not retain control over Mr. Ickes, and Plaintiffs have not pointed to any evidence to the contrary. In fact, because Truck was reserving its rights to deny coverage for a number of Plaintiffs' claims, and a conflict of interest existed between Truck and its insureds, Truck specifically advised both the Health District and Mr. Ickes, in a letter dated April 23, 1999, that Mt Ickes was only to represent the Health District and that the hospital would control the defense. The letter stated that Mt Ickes had no obligation to represent Farmers' interest in this matter. Thus, Truck did not engage in any on-reservation conduct, and consequently the Tribal Court did not have jurisdiction over Truck. Thus, the Tribal Court Orders are therefore not enforceable against Truck.

Even assuming, however, that Plaintiffs could establish an agency relationship between Truck and Mr. Ickes or that Truck otherwise engaged in on-reservation conduct, the Tribal Court still did not have subject matter jurisdiction over Truck. The seminal case on this issue is Montana v. United States, 450 U.S. 544 (1981). The Montana Court noted that the "exercise of tribal power beyond what is necessary to protect tribal self-

government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express congressional delegation." Id. at 563-64.

The Montana court set forth two exceptions that would permit tribes to exercise civil jurisdiction over nonmembers under limited circumstances: The first exception permits a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." Id. at 565. The second exception allows tribes to exercise inherent sovereign power over the conduct of non-Indians on a reservation when that conduct "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. The Supreme Court, however, has clarified that this second exception must be narrowly applied, explaining that "the exception applies when to hold otherwise would threaten "the right of reservation Indians to make their own laws and be ruled by them." Strate, 520 U.S. at 459.

Truck argues, and this court agrees, that neither exception applies in this case. Truck does not have any "consensual relationship" with the Tribe or any of the individual Plaintiffs, and therefore the first exception does not apply. In addition, the second exception does not apply because, as in Strate, regulatory or adjudicatory authority over the alleged tortious conduct by Truck against Plaintiffs (i.e., Mt Ickes' alleged bad faith conduct during the Tribal Court proceedings) is not needed to preserve the Navajo Nation's right to make its own laws and be ruled by them. As in Strate, jurisdiction is not necessary to protect tribal self-government and is not crucial to the political integrity,

economic security or health or welfare of the Navajo Nation. Under Plaintiffs' analysis, the exception would swallow the rule because virtually every act that occurs on the reservation could be argued to have some political, economic, health or welfare ramification to the Tribe. See County of Lewis v. Allen, 163 F.3d 509, 514 (9th Cir. 1998) (narrowly construing the second Montana exception to find that tribal court lacked jurisdiction over tribal member's claim that county deputy sheriff had committed a tort against Plaintiff while engaging in law enforcement activities on the reservation).

b. Full Faith and Credit and Comity

Truck argues that the Tribal Court Orders are not entitled to full faith and credit. In Wilson v. Marchington, 127 F.3d 805 (9th Cir. 1997), cert. denied, 523 U.S. 1074 (1998), the Ninth Circuit found that the Full Faith and Credit Clause of the Constitution applies only to the states and that there is nothing in the debates of the Constitutional Convention concerning this clause that indicates the framers thought the clause would apply to Indian tribes. Id. at 808. The Wilson court determined that whether a tribal court judgment was to be enforced should be considered solely as a matter of comity. This court agrees.

Truck also argues that the Orders should not be enforced against Truck as a matter of comity. The Wilson court set forth the proper test to apply when considering whether to enforce a tribal judgment as a matter of comity. The court found that, as a general principle, federal courts should recognize and enforce tribal judgments. Id. at 8 1 0. However, the court stated that federal courts must neither recognize nor enforce tribal judgments if the tribal court did not have both

personal and subject matter jurisdiction or if the defendant was not afforded due process of law. Id.

In this case, Truck argues, and this court agrees, that the Tribal Court did not have subject matter jurisdiction and that Truck was not afforded the basic tenets of due process. Truck and Mt Ickes were added as defendants and bound—after the fact—by the Orders entered by the Tribal Court. The Tribal Court made findings about their conduct without any evidentiary hearing. Neither Truck nor Mr. Ickes was ever given an opportunity to defend against these new claims. Accordingly, this court will not enforce the Tribal Court Orders under principles of comity.

2. Mr. Ickes

a. Subject Matter Jurisdiction

Plaintiffs claim that the Tribal Court had jurisdiction over Mt Ickes pursuant to the Montana/Strate analysis because, among other things, he entered into a consensual contract with the Tribe by contracting with the Navajo Court to be an officer of the court. This court rejects the argument that he entered into a consensual contract with the Tribe by becoming an officer of the Navajo Court. Moreover, the absence of any nexus between the allegations contained in the Complaint filed in Tribal Court and the alleged misconduct of Mr. Ickes also defeats Plaintiffs' argument. In addition, for the reasons set forth above pertaining to Truck, the court finds that the second Montana/Strate exception does not apply. Thus, the court finds that the Tribal Court did not have jurisdiction over Mt Ickes, and it therefore will not enforce the Tribal Orders against him.

b. Full Faith and Credit and Comity

As stated above, this court finds that the Tribal Court did not have jurisdiction over Mr. Ickes, and, for the reasons set forth above pertaining to Truck, that Mr. Ickes was not afforded the basic tenets of due process. Like Truck, Mr. Ickes was added as a Tribal Court Defendant and bound—after the fact—by the Orders entered by the Tribal Court. fn3 The Tribal Court made findings about his conduct without any evidentiary hearing. Mr. Ickes was never given an opportunity to defend against these new claims. Accordingly, this court will not enforce the Tribal Court Orders under principles of comity.

c. Attorney Immunity

Mr. Ickes also argues that this court should not enforce the Tribal Court Orders because it is against the public policy of both Utah and the United States to hold an attorney liable to a non-client absent fraud, collusion or privity of contract. Oxedine v. Overturf, 973 R2d 417, 421 (Utah 1999) (citing National Say. Bank v. Ward, 100 U.S. 195, 205-06 (1880)); see also Tappen v. Ager, 599 F.2d 376, 378 (10th Cit 1979); Garcia v. Rodey, Dickason, Sloan, Akin & Robb, 750 R2d 118 (N.M. 1988). The Garcia court noted that appropriate means generally existed to redress grievances concerning the alleged misconduct of an adverse attorney, either within the action itself or by invoking disciplinary proceedings through the disciplinary board. Id. at 763.

This court agrees that Mr. Ickes could not be liable to Plaintiffs in the circumstances involved in the Tribal Court action. fn4 Thus, this court will also not enforce the Tribal Orders entered against Mt Ickes for this reason. fn5

II. PLAINTIFFS' MOTION FOR RECONSIDERATION AND REQUEST FOR DECLARATORY JUDGMENT

Plaintiffs have moved for reconsideration of this court's Order dated October 30, 2000, relying on "new case law." Plaintiffs claim that on September 26, 2000, the Tenth Circuit issued a relevant decision in NLRB v. Pueblo San Juan, 228 F.3d 1195 (10th Cir. 2000). In addition, they point out that the First Circuit recently issued a decision in Ninigret Dev't Corp. v. Narragansett Indian Wetuojuck Housing Auth., 207 F.3d 21 (1st Cir. 2000) (decided March 22, 2000). Plaintiffs, however, have failed to provide any legitimate ground for reconsideration.

Courts generally recognize three grounds for reconsideration: (1) an intervening change in controlling law; (2) availability of new evidence; and (3) the need to correct clear error or prevent manifest injustice. Ekotek Site PRP Comm. v. Self, 932 F. Supp. 1319 (D. Utah 1996). The two "new" cases on which Plaintiffs rely were decided prior to the court's October 5, 2000 hearing on the matter and prior to the court's October 30 Order. Thus, Plaintiffs could have timely argued the relevance of these cases, but failed to do so. Moreover, these cases are not contrary to the court's Order and thus are not intervening changes in controlling law. Finally, due to the court's own research, the court was aware of these two cases prior to issuing its Order Thus, the court will not reconsider its Order based on these cases.

Plaintiffs also rehash several of the arguments made previously in the Plaintiffs' supporting briefs, and thus again have failed to provide a legitimate basis for reconsideration of these arguments. However, even

considering the merits of Plaintiffs' arguments, they all fail for the reasons set forth in the court's October 30 Order and in the Health District's Memorandum in Opposition to Plaintiffs' Motion for Reconsideration.

Finally, Plaintiffs have also filed a Motion for Declaratory Judgment and Amendment to the Plaintiffs' Motion for Reconsideration Due to the Unconstitutionality of the Utah Governmental Immunity Act ("UGIA"). It is unclear whether Plaintiffs' motion is directed at only Plaintiffs' claim seeking enforcement of the Tribal Court Orders or also at Plaintiffs' remaining claims in this action. The court has assumed that it pertains only to enforcement of the Tribal Court Orders. If Plaintiffs intended to file such a motion regarding any remaining claims, they may do so at a later date.

Again, Plaintiffs have not provided a basis for reconsideration, as they could have made such arguments prior to the court's Order. Addressing the merits of the argument, however, the court denies Plaintiffs' motion. The court, in its October 30 Order relied on the State of Utah's inherent immunity—not Governmental Immunity—in finding that the County and Health District Defendants were immune from suit in Tribal Court. The court relied on only one portion of the UGIA, Utah Code Ann. § 63-30-4(4), which pertains to the immunity of individual employees of the State. This provision has been found by a majority of the Utah Supreme Court to be constitutional. See Lyon v. Burton, 5 P.3d 616 (Utah 2000). Thus, the court denies Plaintiffs' motion.

IV. CONCLUSION

For the foregoing reasons and good cause appearing, it is hereby ORDERED that:

(1) What has been treated as Mr. Ickes' motion to dismiss Plaintiffs' declaratory judgment action against him (docket entry # 32) is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against Mr. Ickes is DISMISSED;

(2) What has been treated as Truck's motion to dismiss Plaintiffs' declaratory judgment action against it (docket entry # 3 1) is GRANTED, and Plaintiffs' claim for declaratory judgment pertaining to enforcement of the Tribal Court Orders against Truck is DISMISSED;

(3) Plaintiffs' Motion for a Temporary Restraining Order (docket entry # 5), which has been converted to a Preliminary Injunction Motion, is DENIED to the extent that it requests enforcement of the Tribal Court Orders against Mr. Ickes or Truck.

(4) Plaintiffs' Motions for Summary Judgment (docket entries # 77 and 82) are DENIED;

(5) Plaintiffs' Motion for Reconsideration (docket entry # 86) is DENIED;

(6) Plaintiffs' Motion for Declaratory Judgment and Amendment to the Plaintiffs' Motion for Reconsideration Due to the Unconstitutionality of the Utah Governmental Immunity Act (docket entry # 103) is DENIED;

(7) Plaintiffs' Motion for Declaratory Judgment (docket entry #106) is DENIED;

(8) Plaintiffs may file and serve a memorandum in opposition to Mr. Ickes' motion to dismiss (docket entry # 18) no later than January 9, 2001. Plaintiff should

address whether, in light of this court's ruling herein, there exists any basis for retaining Mr. Ickes as a Defendant in the instant case. Plaintiffs should also address whether Truck should be retained as a defendant in the instant case in light of the court's ruling herein. Such memorandum must be within the page limitations set forth in the local rules. Mr. Ickes and Truck may then file and serve a reply memorandum no later than January 22, 2001.

(9) Regarding Plaintiffs' Motion for Certification Under Rule 54(b) (docket entry # 84), no later than January 12, 2001, any party to this action may file a brief pertaining to whether this court should certify, under Rule 54(b), the instant Order and also the Order dated October 30, 2000. The court will then rule on that motion.

DATED this 12th day of December, 2000.

BY THE COURT:

s/ Dale A. Kimball DALE A. KIMBALL
United States District Judge

Footnotes

fn1. Specifically, there are four motions on these issues: (1) Truck's motion to dismiss Plaintiffs' declaratory judgment claim, (2) Mr. Ickes' motion to dismiss Plaintiffs' declaratory judgment claim, (3) Plaintiffs' Motion for Summary Judgment, and (4) Plaintiffs' Amended Motion for Summary Judgment. Truck's opening brief is actually entitled "Memorandum Brief Regarding Subject Matter Jurisdiction, Full Faith and Credit, Comity, and Exhaustion." Mr. Ickes' brief is similarly captioned. In a previous Order, the court stated

that it would treat these briefs as motions to dismiss Plaintiffs' declaratory judgment claim.

fn2. Whether a tribal court has civil jurisdiction over a non-Indian defendant is a question that must be answered by reference to federal law and is therefore a federal question under 28 U.S.C. 1331. See, e.g., National Farmers Union Insurance Cos. v. Crow Tribe of Indians, 471 U.S. 845, 852 (1985).

fn3. Mr. Ickes cites numerous examples regarding the Tribal Court's due process violations. However, Plaintiffs dispute Mr. Ickes' characterization of the events in the Tribal Court that he contends deprived him of due process. Plaintiffs maintain that, if the court were to rely on such examples, it would be obligated to review the entire Tribal Court record. Rather than examining the entire record of the Tribal Court, the court relies solely on the fact that Mr. Ickes was added as a defendant and "bound" by the Tribal Orders without the opportunity to be heard. Thus, the Tribal Court necessarily made findings about his conduct based solely upon Plaintiffs' briefs and without any input from Mr. Ickes. This court will not enforce any order from any court that is made under such circumstances.

fn4. Mr. Ickes has also filed a Motion to Dismiss requesting that the court dismiss him as a Defendant in the case at bar. The court had previously granted Plaintiffs' request to hold this motion in abeyance until twenty days after the court's ruling on the Tribal Court issues. Given the court's ruling regarding Mr. Ickes, it is difficult to imagine any scenario under which Mr. Ickes would be an appropriate defendant in this action. However, before the court rules on Mr. Ickes' motion, Plaintiffs are invited to file a memorandum in opposition to Mr. Ickes' motion to dismiss if they believe that some

legitimate basis still exists despite the court's ruling pertaining to Mr. Ickes. In addition, in the same memorandum, Plaintiffs should discuss whether Truck should be retained as a defendant in the instant case in light of the court's ruling herein. Such memorandum must be filed and served no later than January 9, 200 1 and must be within the page limitations set forth in the local rules. Mr. Ickes and Truck may then file and serve a reply memorandum no later than January 22, 2001.

fn5. Of course, because this court finds that Mr. Ickes could not be liable to Plaintiffs in the Tribal Court action, and in light of Plaintiffs' argument that Truck's liability was based upon Mr. Ickes' conduct, an additional basis exists upon which the court finds that the Tribal Court Orders are not enforceable against Truck.

TESTIMONY OF THE HONORABLE CHIEF JUSTICE OF THE NAVAJO NATION BEFORE THE UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS REGARDING THE IMPACT AND AFFECT OF THE RECENT SUPREME COURT DECISIONS ON NAVAJO SOVEREIGNTY

INTRODUCTION

Ya at téeh, my name is Robert Yazzie. I am the Chief Justice for the Navajo Nation. fn1 I want to thank Senator Inouye and the honorable members of the U.S. Senate Committee on Indian Affairs for inviting me here to comment on the recent U.S. Supreme court rulings as they affect the powers and authority of Navajo Nation sovereignty. The impact of these decisions has been profoundly severe and adverse for all Indian nations and the Navajo Nation in particular. However, these impacts can only be understood against a backdrop of settled Native American sovereignty and a brief overview of the Navajo Nation's judicial system.

The foundation principles of federal Indian law, under which the sovereignty of the Navajo Nation is legally defined, have evolved for over more than two hundred years in treaties, statutes, court decisions and actions of the Executive branch of the federal government. These principles operate to preserve tribal rights and tribal government authority in a legal system in which tribes have little political influence. In his seminal Handbook of Federal Indian Law, Felix Cohen noted that

1. tribes originally had all the powers of any sovereign state;

2. they then became subject to the legislative power of the United States; but

3. they retained all their powers of self-0govemment except as expressly limited by treaties or acts of Congress. fn2

In order to interpret and apply Congressional limitations on Indian sovereignty, the U.S. Supreme Court established canons of construction, or special rules that were designed "to narrow interpretation of federal treaties, statutes and regulations that intrude upon Indian self determination and to promote broad interpretations of provisions that benefit Indians." fn3

The Court further developed the doctrines of reserved tribal rights (which states that many of the rights tribes possess were not granted to them but rather were reserved by them when they ceded lands to non-Indians by treaty); federal trust responsibility (which holds that the federal government has fiduciary obligations for the management of Indian trust lands, funds and resources); and the plenary power of Congress (under which Congress is said to be vested with very broad power over Indian affairs).

The application of these foundation principles had provided broad geographic sovereignty to Indian nations for 150 years until the U.S. Supreme Court's decision in Montana v. United States. fn4 This sovereignty was meant to be limited only by specific showings of Congressional intent. Beginning prior to Montana, with Oliphant v. Suquamish Indian Tribe, fn5 and continuing through Montana and its progeny—specifically Strate v. A-I Contractors, fn6 Nevada v. Hicks, fn7 and Atkinson Trading Company v. Shirley fn8–the U.S. Supreme Court has single-handedly succeeded in undermining Congressional intent and seriously threatened Native America's political, economic, and cultural survival. None of these recent Supreme Court cases reveal

evidence that Congress has explicitly taken away a sovereign power of any Indian Nation. Rather, the Court has applied a rule it unilaterally created in Oliphant called "implicit divestiture" which theorizes that "Indian tribes are proscribed from exercising both those powers of autonomous states that are expressly terminated by Congress and those powers inconsistent with their status' [as domestic dependent nations]." Based on the aforementioned cases, Indian Nations are therefore implicitly divested of their civil jurisdiction over state process servers (Hicks), taxing authority over non-Indian hotel operators on private fee land located within our territorial boundaries (Shirley), criminal jurisdiction over non-indians committing crimes within our reservation boundaries (Oliphant), regulatory power over hunting and fishing by non-Indians on private fee land within our territorial boundaries (Montana), and civil jurisdiction over non-Indians in cases arising on state rights-of-way crossing through our territorial boundaries (Strate).

In other words, there does not seem to be anything principled or doctrinally sound about the Court's recent jurisprudence in federal Indian law; rather, the Court's jurisprudence "seems based on [a] political expediency" fn9 that solely benefits non-Indians and state governments. The combined result, or impact as this Committee seeks to determine, is the inability of the Navajo Nation to maintain its "political integrity, economic security, or the health or welfare" of its

people.fn10 In short, the Navajo Nation is faced with nothing less than a threat of cultural, economic, and political genocide.

In the end, we are talking about territorial integrity. We are talking about the ability of Indian nations to have effective control over all activities within their boundaries for the common welfare. At present, neither non-Indians nor Indians have a clear understanding of what happens when someone commits an act or causes harm within reservation boundaries. The jurisdictional confusion in criminal law caused by questions concerning inherent criminal jurisdiction over non-Indians and contested criminal jurisdiction over nonmember Indians leaves victims of crime unaided and helpless because of the failure of federal prosecutors to effectively prosecute crime. fn11 Doubt over civil jurisdiction in either regulatory or adjudicative areas multiplies litigation and frustrates legitimate governmental policies, such as imposing a hotel occupancy tax on all business within the Navajo Nation, as do the surrounding states.

As for Justice Souter's concerns about protecting the civil rights of non-members, the fact is that the wealthy are able to seek federal review in all-or-nothing disputes over jurisdiction, while ordinary people do not have that luxury. The concern expressed about the use of customary law is unreasonable, because the Navajo Nation jurisprudence in that field is clearly pro-individual rights. fn12 The Indian legal community and the academic community is moving swiftly to make sense of Indian customary law for everyone through court opinions, law journal articles, and training programs that stress the superior advantages of Indian customary law. It should be noted that there are growing movements in American law (restorative justice, therapeutic jurisprudence, and polycentric law) that hold up Indian customary law as a model to be adopted by Americans in general. fn13 The limitations in the Indian Civil Rights Act identified by Justice Souter

are negligible compared to the primary considerations of due process and equal protection that are required by the Act.

Justice Souter's concerns about the scope of the protection of individual rights are fully addressed in the Navajo Nation Bill of Rights fn14 It adopts all provisions of the United States Bill of Rights, with the exception of the right to appointed counsel for indigents in criminal cases. That gap was closed with adoption of an indigence policy, which requires appointed counsel in all instances where there is a "likelihood of incarceration." In addition, the Navajo Nation Bill of Rights guarantees the rights to life, liberty, and happiness, and also includes the right to gender equality (i.e., the Equal Rights Amendment) that is not a part of American Constitutional guarantees. It may be that Indian nations such as the Navajo Nation, which zealously promotes individual rights, should be given the first option for expanded criminal and civil jurisdiction.

SPECIFIC EXAMPLES OF NEGATIVE IMPACTS

The Supreme Court's recent decisions have created confusion for the Navajo Nation. Business entities such as electric utilities and natural gas pipeline companies possessing right of way grants or leases on tribal lands have challenged the authority of the Navajo Nation. These companies have argued that their right of way grants or leases are the equivalent of fee lands under Strate vs. A-1 Contractors. They alleged that the Navajo Nation's consent to their grants is not sufficient to retain jurisdiction. These challenges have adversely impacted the economic stability of the Navajo Nation government by jeopardizing future tax returns. The decreased revenues have a direct correlation on the level of

essential governmental services that the Navajo government can or is able to provide to all residents and travelers of the Navajo Nation.

The Strate, Hicks, and Atkinson decisions also adversely impact economic development within the Navajo Nation. Businesses located on fee land are able to avoid paying tribal taxes while businesses located on trust lands continue to pay. The fee land businesses, for all practical purposes receive, a free ride and the benefits of a civilized society that are assured by the provision of governmental services by the Navajo Nation.

Within the realm of criminal jurisdiction, the following are brief examples of how these decisions have impacted the ability of the Navajo Nation's provision of public safety services and assuring victim's rights.

In December 1997, Russell Means, an enrolled member of the Lakota Nation, was arrested for two counts of battery and one count of threatening: It is alleged that Mr. Means struck his former father-in-law, an enrolled member of the Omaha Nation, and spit in the face of his nephew, an enrolled member of the Navajo Nation. These incidents occurred within the territorial jurisdiction of the Navajo Nation. To date, however, neither the victims nor the Navajo Nation have had their day in court as the Navajo Nation has diverted its attention from the actual criminal prosecution to a lengthy battle over jurisdiction. Although the Nation is now hoping to go to trial soon with the Supreme Court's recent denial of certiorari in the matter of United States vs. Michael Enas, Mr. Means has an appeal pending in the Circuit Court of Appeals.

In the mid 1990's, Bruce Williams, a non-Indian, raced through a community located within the territorial

jurisdiction of the Navajo Nation just to demonstrate that the Navajo Nation did not have criminal jurisdiction over his activities.

In July 2001, an enrolled member of the Navajo Nation battered his spouse on tribal fee land (a HUD Indian Housing cluster), but due to the Supreme Court's recent decision in Alaska vs. Native Village of Venetie, neither the Navajo Nation nor the United States Attorney's Office had jurisdiction over the matter. More importantly, the State of New Mexico did not demonstrate any interest in pursuing a prosecution. We have prepared a flow chart demonstrating the Navajo Nation criminal justice system to enhance your understanding of the complexity of our criminal justice system. This flowchart is attached.

In November 2001, an enrolled member of the Hopi Nation was arrested for unlawful weapons, possession and distribution of liquor within the exterior boundaries of the Navajo Nation's territorial jurisdiction. Unfortunately, he was arrested on a right-of-way granted to the State of Arizona by the Navajo Nation. Since then, the Navajo Nation has been embroiled in a jurisdictional dispute, ala Strate that promises to evade the merits of the case at least as long as the ongoing issue with Russell Means.

Several years ago, a county police officer engaged in a high-speed chase on a right of way granted by the Navajo Nation to the State of Arizona. This high-speed chase sadly resulted in the death of at least one individual when their vehicle missed a curve. County police officers are now entering the Navajo Nation and confiscating State license plates from vehicles owned by Navajos without going through any tribal process. County police officers are now also entering the Navajo

Nation and removing or attempting to remove Navajos for crimes committed outside the reservation without going through the Navajo Nation's codified extradition process.

In fact, calls are received regarding possible attempts by creditors to repossess property without going through Navajo Nation process. Pursuant to Navajo law, self-help remedies are illegal and creditors must seek and obtain an official order from the Navajo Courts to repossess property.

Recently a public outcry arose when a severely intoxicated Navajo man killed four people on a State highway outside the jurisdiction of the Navajo Nation. Regardless of the fact that the driver was a BIA employee driving a BIA vehicle, media attention focused on the fact that the driver had numerous tribal DUI convictions that went unreported to State authorities. The Navajo Nation struggled to explain that reporting agreements between the Navajo Nation and state law enforcement agencies have consistently broken down because state courts will not recognize tribal court judgments. Tribal judges, operating under the constraints of a jail conditions consent decree for limited jail space, often confiscate a state driver's license when the driver is found guilty of DUI. Unfortunately, all those drivers have to do at the State's Department of Motor Vehicle is to claim a lost license to obtain a duplicate.

The Congress, in 1994, passed the Violence Against Women Act. The VAWA purports to protect all women throughout the United States from domestic violence. However, pursuant to the present federal statutory scheme in Indian country regarding jurisdiction, whenever a Navajo woman is beaten by a non-indian

spouse neither the State nor the Navajo Nation is presumed to have jurisdiction over the matter, only the federal government can prosecute. However, because of the status of the crime in Indian country being a misdemeanor, which occurred outside the presence of a federal agent, there is not an immediate arrest. More importantly, if the victim is not severely injured or killed then the United States Attorney's Office will generally decline the matter. It is important to note here that at least one federal district has suggested that they will at least issue the perpetrator a citation from the Central Violations Bureau. For all intents and purposes, this is a meaningless gesture, because this process does not remove the perpetrator from the home or proximity of the victim. It is similar to a civil traffic citation demanding that the person appear in court on a certain date.

Some scholars have suggested that the Nation exercise its right to exclude. However, an exclusion order is no more effective against domestic violence than a protection order or the above-described Central Violations Bureau citation. How many women across the United States have been either injured or killed while under the purported protection of restraining orders.

THE NAVAJO JUDICIAL SYSTEM

The "implicit divesture" doctrine that has so ravaged tribal sovereignty was based on wholly unjustified and subjective opinions about the competency of Indian courts. The Oliphant Court stated that tribal courts' attempts to exercise criminal jurisdiction over non-Indians was a "relatively new phenomenon" that lacked "any semblance to a formal court system," where the "emphasis was on restitution rather than on

punishment." fn15 While American penal institutions are presently at overflow capacity, the merits of punishment versus restitution are beyond the scope of our discussion here. Rather, our emphasis must remain on the perceived lack of our courts' semblance to formal court systems.

In July 2001, U.S. Supreme Court Justices Sandra Day O'Connor and Steven Breyer joined a host of other federal and state judges at Window Rock, Navajo Nation; to acknowledge the vital role Indian courts play in Indian communities across the country. They discovered a sophisticated and competent Navajo judicial system that has existed since 1959 when, as an act of self-determination and an expression of tribal sovereignty, the Navajo Nation Council declared their right to create their own laws by abolishing the CFR court and replacing it with the Courts of the Navajo Nation.

The Navajo courts process roughly 90,000 cases annually. In fiscal year 2001, statistics illustrate that Navajo courts dealt with a caseload of 88,000 cases. Of these, 22,275 (25%) were criminal cases; 6,322 (7%) were criminal traffic cases; 27,980 (32%) were civil traffic cases; 5,150 (6%) were civil cases; 2,371 (3%) were family civil cases; 4,354 (5%) were domestic violence cases; 2,390 (3%) were delinquency cases; 489 (1%) were juvenile dependency cases; 988 (1%) were juvenile traffic cases; 13,400 (15%) were probation cases; 1,233 (2%) were peacemaking cases; and 168 (1%) were Supreme Court Cases.

A. Court Structure

The Navajo judicial system is a two-tiered system. There are seven district courts or trial courts located

throughout the Navajo Nation. These courts generally have four divisions: 1) District Court; 2) Family Court; 3) Small Claims Court; and 4) the Peacemaker Division. Each judicial district has a district court and five of the seven districts have a separate family court. The courts located in Arizona are at: Tuba City, Kayenta, Chinle, and Window Rock. In New Mexico, they are located in Shiprock, Crownpoint, and Ramah. Two satellite courts under the Ramah district are located in New Mexico at To'Hajiilee and Alamo. Eighteen judges make up the Navajo judiciary. fn16 Fourteen are trial judges who preside in the district and family courts in the districts, the trial judge supervises the court staff and administers the court with the help of the court administrator. fn17 Cases begin in the trial courts, and the decisions of these trial courts may be appealed to the Navajo Nation Supreme Court located in Window Rock, Arizona. The Supreme Court hears appeals from the trial courts on questions of law raised on the record and certain administrative agency decisions. Trial de novo is not allowed. Three appellate judges preside in the Supreme Court. One appellate judge is the Chief Justice and the other two are Associate Justices. fn18

B. Peacemaking

As mentioned earlier, the Navajo Nation employs two justice systems to resolve disputes:

1) the Anglo-American adversarial system of justice, and 2) the Navajo traditional justice system, or peacemaker division. The peacemaking division does not use judges, juries, lawyers, police officers, or jails. It is a system of court-annexed mediation and arbitration which draws on the traditional Navajo institutions of family, clan, community and traditional leaders who are selected on the basis of wisdom, stature, and ability to

solve problems. fn19 The peacemaker is a persuasive leader who applies Navajo values to arrive at consensual solutions to disputes.

C. Judicial Code of Conduct

Judges carry out their duties and responsibilities guided by Title 7 of the Navajo Nation Code and the Code of Judicial Conduct that was adopted in 1991 and patterned after the ABA Model Code of Judicial Conduct. fn20 An independent Judicial Conduct Commission reviews serious complaints of misconduct filed by the public against the Navajo Nation judges and can recommend removal of a judge to the Chief Justice. As their supervisor, the Chief Justice reviews minor complaints against all Navajo Nation judges. The Navajo Nation judicial system is structured to avoid abuses and non- legal attacks claiming that the court's decisions are unreasonable, biased, and motivated by political influence. The Code of Judicial Conduct, coupled with the authority of the Chief Justice to supervise the work of judges, reinforces the soundness of the decision-making process. In addition, members of the Navajo Nation Bar Association, the Judiciary Committee of the Navajo Nation Council and the Chief Justice evaluate Navajo Nation judges' judicial and administrative skills annually. These evaluations include independence in decision-making, knowledge of the law, courtroom demeanor, and staff supervision. These evaluations are used to identify the judge's strengths, weaknesses and areas of training need.

D. Court of Record

Contrary to the position of the federal courts and the United States Attorneys Office, all Navajo courts are courts of record. All trial proceedings are recorded. The

Navajo Supreme Court issues written opinions and the lower courts issue opinions involving cases of first impression. fn21

E. Bill of Rights

The Indian Civil Rights Act (a federal law) and the Navajo Nation Bill of Rights require the Navajo courts to safeguard the rights of individuals and to settle their claims fairly. Court proceedings are conducted in both the Navajo and English languages. Navajo court interpreters can be used to assure that litigants understand what is said in court proceedings. There are extensive court rules, which govern how cases are handled and decided. Court rules are designed to ensure fundamental fairness and impartiality. The Navajo courts apply criminal and civil laws of the Navajo Nation, including statutes and Navajo common law. Where no specific Navajo law exits, applicable federal or state law is often used.

Although individuals have the right to represent themselves, Navajo judges will appoint counsel for a person if the person is unable to afford counsel. One important right is the defendant has a right to a jury trial in criminal cases. There are other rights guaranteed to the criminal defendant by these laws. Indians have many civil rights; among them are protections in criminal proceedings. All persons under the 1968 Indian Civil Rights Act; have a right to legal counsel in criminal cases at his or her own expense. Where appropriate, poor defendants have a right to appointed legal counsel. Members of the Navajo Nation Bar Association must represent poor defendants without charge. The Navajo Nation has no written constitution. A Bill of Rights is provided in the 1968 ICRA and the 1967 Navajo Bill of Rights. The Navajo Nation Bill of Rights provides for

greater protection than the ICRA in the provisions of the Bill and the way Navajo Nation courts interpret it.

F. Appointment Process

The Navajo courts are independent from political influence and external pressures. Cases are decided using evidence properly admitted by the court and by applying applicable laws. To ensure that the Navajo courts will be free from political influence and bias, the Navajo nation Council in 1958, created a system for appointment (instead of election) of Navajo Nation judges. The Navajo Nation appoints its judges rather than elect them. When a judgeship vacancy occurs, Navajo candidates who meet the qualifications submit an application, which is reviewed and screened by the Navajo Judiciary Committee, a standing committee of the Navajo Nation Council. The committee evaluates each applicant based on educational attainment, professional experience, and knowledge of Navajo culture and the Navajo language. The top qualifying candidates are recommended to the Navajo Nation president. The president makes a final selection, which is submitted to the Navajo Nation Council for confirmation. Before permanent confirmation, each judge serves a two-year probationary period.

G. Navajo Nation Bar Association

The Navajo Nation Bar Association (NNBA) has several committees that operate the association. One committee is the disciplinary committee, which hears complaints against lawyers and advocates and disciplines when necessary. Only members of the NNBA can practice in the Navajo courts and before the several Navajo Nation

administrative agencies that conduct hearings. To become a member, an applicant must have proper moral character and fitness and pass an examination. There are over 400 Indian and non-Indian members of the NNBA, attorneys (law school graduates) and lay advocates (non- law school graduates, but with legal training), who reside in Arizona, New Mexico, Utah, and Colorado. Some live in other states and foreign countries. To become a bar member, a person must pass an exacting bar examination.

H. Jury Trials

Jury trials are a matter of right in all criminal cases, but that is not an absolute right in civil cases. The jury consists of no less than six (6) jurors. Both Indians and non-Indians serve. They represent a fair cross-section of the community. Jurors are selected in accordance with court rules.

I. Jurisdiction

The Navajo trial courts have general civil jurisdiction and limited criminal jurisdiction. fn22 Navajo civil jurisdiction extends to all persons (Indian and non-Indian) who reside in Navajo Indian Country or who have caused an action to occur in Navajo Indian Country. The Navajo Courts criminal jurisdiction extends to all crimes codified in the Navajo Nation Code along with its terms of punishment. However, the Navajo Nation is prohibited by Congress to impose any sanction greater than 365 days in jail and/or a $5000 fine. fn23 Serious offenses, such as those listed in the Major Crimes Act, are tried in both the Navajo and federal courts.

CONCLUSION

For the past twenty-five years, the United States Supreme Court has ruled in an increasing number of cases that tribes, including the Navajo Nation, under federal law, lack jurisdiction over non-members in Indian Country. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 98 5S Ct. 1011 (1978) (tribes lack jurisdiction to prosecute and convict non-Indians); Duro v. Reina, 495 U.S. 676, 110 S. Ct. 2053 (1990) (tribes lack jurisdiction to prosecute and convict non- member Indians); Montana v. United States, 450 U.S. 544 (1981) (tribes may assert authority over non-members only where such non-members consent to tribal jurisdiction or where the non-member's activity threatens the political or economic integrity or health and welfare of the tribe); Strate v. A-1 Contractors, 520 U.S. 438 (1997) (the tribal court lacks authority to adjudicate a suit between non-members regarding an accident that occurred on the reservation); Atkinson Trading Co. v. Shirley, 121 S. Ct. 1825 (2001) (tribe lacks authority to impose a hotel occupancy tax on non-member guests of a hotel on the reservation); and Nevada v. Hicks, 121 S. Ct. 2304 (2001) (tribal court lacks authority over state officers serving process upon an Indian on a reservation and also to hear federal civil rights claims under 42 U.S.C. § 1983).

The challenge of the years to come regarding the powers of tribal governments will emanate primarily from the individuals and institutions that do not understand the unique positions Indian tribes occupy within the federal constitutional system. The most recent decisions by the United States Supreme Court add momentum to a jurisprudential trend advancing the sovereignty of states and the interests of nontribal members in Indian country at the expense of tribal rights to self-determination. . . . Congress has largely stood by as the Supreme Court has

literally rewritten the law relating to the scope of inherent tribal sovereignty. fn24

The Navajo Nation looks to Congress to assist in addressing the needs of Indian courts and in the development of laws to reinvigorate tribal self-determination and self-government. We look forward to working with this Committee to jointly address these issues.

Footnotes

fn1 The Navajo Nation is the largest Indian nation in the United States. The Nation covers more than 17 million acres (27,000 square miles) spanning across Arizona, New Mexico, and Utah forming nearly 36 percent of all that remains of Indian lands in the lower 48 states. In fact, the Navajo Nation has been compared in size to such States as West Virginia and South Carolina. The Navajo Nation is largely rural and has a population density of about six persons per square mile. And like most Indian reservations or other rural communities, it is greatly affected by problems associated with a seriously depressed economy and an alarming rate of crime. According to the most recent figures available, 56.1 percent of Navajo families live below poverty level and our unemployment rate is 36 percent to more than 50 percent, depending on the season. Our per capita income averages $6,2 I 7.00 annually in comparison to the United States per capita income of $28,542.00. The population growth of the Navajo Nation is double the national rate and the median age is 22.4 years old. More importantly, with a citizenship of almost 300,000 enrolled members the Navajo Nation courts provides services to almost thirteen percent of all the federally recognized Indians within the United States.

fn2 FELIX COHEN, HANDBOOK OF FEDERAL INDIAN LAW 123 (1941).

fn3 Philip P. Frickey, Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law, 107 Harv.L.Rev. 381, 418, n. 158 (1993).

fn4 450 U.S. 544, 565 (1981) ("the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.")

fn5 U.S. 191 (1978).

fn6 520 U.S. 438 (1997).

fn7 121 S.Ct. 2304 (2001).

fn8 121 S.Ct. 1825 (2001).

fn9 N. Bruce Duthu and Dean B. Suagee, Supreme Court Strikes Two More Blows Against Tribal Self-Determination, Natural Resources & Environment (Fall 2001); quoting Alex Skibine, The Court's Use of the Implicit Divestiture Doctrine to Implement Its Imperfect Notion of Federalism in Indian Country, 36 Tulsa L.J. 269. 303 (2000).

fn10 450 U.S. at 565-566.

fn11 The Navajo Nation must coordinate the prosecution of Major Crimes with the U.S. Attorney's Office within New Mexico, Arizona, and Utah. Each of which operates independently utilizing three separate prosecutorial guidelines.

fn12 See, for example. Begay v. Navajo Nation, N.L.R. Supp. 13, 16 (Nav. Sup. Ct. 1988)(Navajo court

proceedings must comply with the Navajo Bill of Rights and the Indian Civil Rights Act, and as such, we must insure compliance with procedural and substantive due process before someone is deprived of their private property); Navajo Nation v. Atcitty, 4 N.L.R. 76, 78 (Nav. Ct. App. 1983)(...due process protections [are] an important element in the jurisprudence dynamic found in the federal and state courts and is equally found within the mandates and procedures of the Courts of the Navajo Nation); Mustache v. Navajo Bd. of Election Supervisor, 5 N.L.R. 57, 59 (Nav. Sup. C 1987)(The Indian Civil Rights of 1968, 25 U.S.C.§1302(8), guarantees procedural due process in hearings before tribal administrative agencies).

fn13 recent accounts estimate around 300 restorative justice programs throughout the United States, and similar processes have long been observed in pre-modern and indigenous societies. Leena Kurki, Incorporating Restorative and Community Justice Into American Sentencing and Corrections, SENTENCING AND CORRECTIONS, September 1999, No. 3 (Magazine of the National Institute of Justice, U.S. Department of Justice), at 4.

fn14 1 NNC §§1-9.

fn15 See generally, 435 U.S. 191 (1978). Navajo courts today are pressured to become mirror images of state courts. Despite that pressure, Navajo common law and statutory laws are the laws of preference in the Navajo Courts. Otherwise, applicable federal law is utilized. Lastly, state law may be applied. Navajo common law is the values and moral principles of the Navajo people, i.e., their traditional customs, usages, and ways of doing things. Lawyers and advocates regularly argue Navajo common law in the courts. Navajo common law is found

in books and articles on Navajo culture and in Navajo Court opinions. Navajo elders and teachers of Navajo culture are also sources of Navajo common law. The choice of law statute of the Navajo Nation is found at 7 NNC §204 of the Navajo Nation Code. The Navajo courts also adopted various rules, which guide litigants through the courts, including rules of pleadings and practice; criminal, civil, and appellate procedure; evidence; and domestic violence and probate procedures.

fn16 Of the eighteen Navajo judges, three are law school trained. Seven judges (half the trial bench) are women.

fn17 The judicial branch employs approximately 140 persons, including court clerks, bailiffs, secretaries, probation and parole officers, and peacemaker liaisons. And there are five court staff attorneys the majority of who are Navajos.

fn18 The chief justice also prepares the budget, sets and implements policies, and oversees Judicial Branch operations. The Navajo Nation Judicial Branch operates on funds from the federal government and Navajo Nation general funds.

fn19 The Peacemaking system is also adaptable to other forms of culture, including principles of Christianity. The parties themselves have the right to select who they deem to be a respected leader from their own particular community to act as "peacemaker."

fn20 Judicial branch employees who are not judges work under the Judicial Branch Personnel Policies and Procedures and the Employee Code of Ethics.

fn21 Twenty-three years ago, in 1969, the Navajo court of Appeals, now the Navajo Nation Supreme Court,

issued its first written opinion. Today, all court opinions are reported in the Navajo Law Reporter, the Indian Law Reporter, and are made available for posting on www.tribalcourts.com.

fn22 The Navajo family courts have jurisdiction over matters involving children, probate, name changes, quiet title, and domestic relations. Children's cases are handled with great care. The district courts have jurisdiction over all other matters that the family courts do not hear, including torts, contracts, and consumer transactions. The amount of controversy is unlimited. More importantly, while it is presumed that there is no criminal jurisdiction over non-Indians, Navajo courts hear civil cases involving them. The Supreme Court has jurisdiction over appeals from final decisions of the trial courts and certain administrative agencies. The Supreme Court decides only on issues of law raised in the record of appeal.

fn23 As a result of Oliphant, the Navajo Nation is prohibited from exercising criminal jurisdiction over non-Indians who commit crimes within Navajo Indian Country. Non-member Indians are also contesting the jurisdiction of the Navajo Nation raising issues of equal protection in that they are similarly situated as non-Indians.

fn24 Supra Footnote 8.

EW 233a

ANETH CHAPTER
Aneth, (Navajo Nation) Utah

RESOLUTION OF THE

ANETH CHAPTER
ANETH (NAVAJO NATION), UTAH

REQUESTING SAN JUAN HEALTH CARE SERVICES TO IMMEDIATELY REINSTATE FRED RIGGS, P.A.C. AS MEDICAL PROVIDER & DONNA SINGER AS MANAGER AT THE HEALTH CENTER & TO DISCLOSE FINANCIAL INFORMATION INCLUDING PROFITS GENERATED AT MONTEZUMA CREEK HEALTH CENTER: THE PERCENTAGE UTILIZED TO SUPPORT COUNTY-WIDE OPERATIONS TO ASSIST THE COMMUNITY IN CONVERTING THE MONTEZUMA CREEK HEALTH CENTER INTO A COMMUNITY CLINIC OPERATED BY A COMMUNITY BASED 501(c)(3) NON-PROFIT CORPORATION.
WHEREAS:

1. The Aneth Chapter is certified and recognized as a governmental entity of the Navajo Nation given the authority to act on behalf of its community to recommend, support and approve all community related issues and concerns for the benefit of local residents; and

2. The San Juan Health Care Services pursued and assumed control of the Montezuma Cteek Health Center in 1995 per Indian Health Service Contract *24590004 to provide vital medical care services to the residents of Aneth, Montezuma Creek, Red Mesa and Mexican Water; and

3. By lease arrangement and for a nominal sum of $1.00 per year, the Utah Navajo Trust Fund have provided an operable facility for medial care operations in Montezuma Creek and additionally a start-up loan of $350,000 was authorized on February 22, 1994 to be repaid timely with Montezuma Creek Health Center profits; and

4. The San Juan Health Care Services is currently experiencing financial difficulties resulting in part from experimentation with various medical management groups, ill-advised managerial decisions/staffing and continued operation of money-losing medical centers at the expense of profit-making facilities (e.g., Montezuma Creek Health Center); and

5. The Montezuma Creek Health Center has unfortunately been made a part of the problem, initially by lack of attention, next by diversion of revenue from Montezuma Creek Health Center to less-profitable county facilities, followed by attempts to shift the IHS billing system from Montezuma Creek to the Monticello Hospital to save northern jobs and finally intimidation (including termination) of employees for speaking out for the needs of the Montezuma Creek Clinic; and

6. San Juan Health Care Services' abrupt dismissal of experienced and dedicated employees (i.e., including the only Navajo-speaking provider) is insensitive and disrespectful of the special medical needs confronting the Navajo People; furthermore these actions are detrimental when stability was finally re established at the Montezuma Creek Health Center.

NOW, THEREFORE BE IT RESOLVED THAT:

1. The Aneth Chapter hereby request the immediate reinstatement of Fred Riggs, P.A.C. as Medical Provider & Donna Singer as Manager of the Montezuma Creek Health Center and that San Juan Health Care Services immediately curtail intimidation of clinic employees who advocate for local needs & interest

2. The Aneth Chapter hereby request San Juan Health Care Services to disclose all financial information pertaining to the Montezuma Creek Health Center including yearly audits, identification of cost factors, actual expenditures, revenues generated at Montezuma Creek Health Center, amount of profits diverted to county-wide operations & compliance with IHS contract stipulations.

3. The Aneth Chapter hereby request San Juan Health Services (without interruption in current delivery of medical services) to provide technical assistance in converting the Montezuma Creek Health Center into a Community Clinic with management by a 501(c)(3) non-profit thereby offering the following advantages (A) reinvestment of profits into local operations, (B) greater reimbursement; from medicaid/medicare, (C) greater accessibility to private monies through status as non-profit and (D) assurance of community involvement.

CERTIFICATION

We, hereby certify that the foregoing resolution was duly considered by the Aneth (Navajo Nation) Chapter, Utah at a duly called meeting at which a quorum was present and the same was passed by a vote of 26 in favor, 00 opposed and 00 abstained, this 6th day of December, 1998.

Robert Whitehorse, Council Delegate
ANETH CHAPTER

Leonard Lee, President
ANETH CHAPTER

Nelson Rockwell, Vice-President
ANETH CHAPTER

Tina Lansing, Secretary/Treasurer
ANETH CHAPTER

EW 237a

RED MESA CHAPTER
Red Mesa, Navajo Nation, Utah

RESOLUTION

RED MESA (NAVAJO NATION), UTAH

REQUESTING SAN JUAN HEALTH CARE SERVICES TO IMMEDIATELY REINSTATE FRED RIGGS, P.A.C. AS MEDICAL PROVIDER & DONNA SINGER DISCLOSE FINANCIAL INFORMATION INCLUDING PROFITS GENERATED AT MONTEZUMA CREEK HEALTH CENTER: THE PERCENTAGE UTILIZED TO SUPPORT COUNTY-WIDE OPERATION & TO ASSIST THE COMMUNITY IN CONVERTING CLINIC OPERATED BY A COMMUNITY BASED 501(c)(3) NON-PROFIT CORPORATION.

WHEREAS:

1. The Aneth and Red Mesa Chapter is certified and recognized as a governmental entity of the Navajo Nation given the authority to act on behalf of it community to recommend, support and approve all community related issues and concerns for the benefit of local residents; and

2. The San Juan Health Care Services pursued and assumed control of the Montezuma Creek Health Center in 1995 per Indian Health Service Contract # 24590004 to provide vital medical care services to the residents of Aneth, Montezuma Creek, Red Mesa and Mexican Water; and

3. By lease arrangement and for a nominal sum of $1.00 per year, the Utah Navajo Trust Fund have provided an operable facility for medical care

operations in Montezuma Creek and additionally a start-up loan of $350,00 was authorized on February 22, 1994 to be repaid timely with Montezuma Creek Health Center profits; and

4. The San Juan Health Care Services is currently experiencing financial difficulties resulting in part from experimentation with various medical management groups, ill-advised managerial decisions/staffing and continued operation of money-losing medical centers at the expense of profit-making facilities (e.g., Montezuma Creek Health Center); and

5. The Montezuma Creek Health Center has unfortunately been made a part of the problem, initially by lack of attention, next by diversion of revenue from Montezuma Creek Health Center to less-profitable county facilities, followed by attempts to shift the IHS billing system from Montezuma Creek to the Monticello Hospital to save northern jobs and finally intimidation (including termination) of employees for speaking out for the needs of the Montezuma Creek Clinic; and

6. San Juan Health Care Services' abrupt dismissal of experienced and dedicated employees (i.e., including the only Navajo-speaking provider) is insensitive and disrespectful of the special medical needs confronting the Navajo People; furthermore these actions are detrimental when stability was finally re established at the Montezuma Creek Health Center.

NOW, THEREFORE BE IT RESOLVED THAT:

1. The Aneth Chapter hereby request the immediate reinstatement of Fred Riggs, P.A.C. as Medical Provider & Donna Singer as Manager of the Montezuma Creek Health Center and that San Juan Health Care Services immediately curtail intimidation of clinic employees who advocate for local needs & interest

2. The Aneth Chapter hereby request San Juan Health Care Services to disclose all financial information pertaining to the Montezuma Creek Health Center including yearly audits, identification of cost factors, actual expenditures, revenues generated at Montezuma Creek Health Center, amount of profits diverted to county-wide operations & compliance with IHS contract stipulations.

3. The Aneth Chapter hereby request San Juan Health Services (without interruption in current delivery of medical services) to provide technical assistance in converting the Montezuma Creek Health Center into a Community Clinic with management by a 501(c)(3) non-profit thereby offering the following advantages (A) reinvestment of profits into local operations, (B) greater reimbursement; from medicaid/medicare, (C) greater accessibility to private monies through status as non-profit and (D) assurance of community involvement.

CERTIFICATION

We, hereby certify that the foregoing resolution was duly considered by the Aneth (Navajo Nation) Chapter, Utah at a duly called meeting at which a quorum was present and the same was passed by a vote of 26 in favor, 00 opposed and 00 abstained, this 6th day of December, 1998.

David L. John, Council Delegate

Louis Tapana, Sr., Chapter President

Harrison Nakai, Sr., Vice-President

Edward Tapana, Secretary/Treasurer

EW 241a

No. 01-4001

STEVEN MACARTHUR, et al.,
Plaintiffs-Appellants,

v.

SAN JUAN COUNTY, et al.,
Defendants-Appellees.

ORDER

Filed November 8, 2002

Before EBEL, McKAY, and LUCERO, Circuit Judges.

Appellants' petition for a panel rehearing and appellees' petition for rehearing en banc are denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered, for the Court
PATRICK FISHER Clerk of Court
by: s/ [illegible]
Deputy Clerk

No. 02-1774; 02-1253

In the

Supreme Court of the United States

FRED RIGGS, DONNA SINGER and AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, BILL REDD, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE AND DENNIS ICKES; and new district officers, NETTIE PRACK (official capacity only), GLEN IMEL (official capacity only), CLEAL BRADFORD (official capacity only), JOHN FELMETH (official capacity only) and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITIONERS' SUPPLEMENTAL AUTHORITY BRIEF

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7 pp

SUPPLEMENTAL AUTHORITIES IN SUPPORT OF THE PETITIONERS PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION AND PETITION FOR REHEARING OF PETITION FOR CERTIORARI

Pursuant to Supreme Court Rule 15- 8, the Petitioners file this brief of supplemental authorities. Petitioners have currently before the Court a Petition for a Writ of Mandamus and Petition for a Writ of Prohibition, docket no. 02-1774 and a Petition for Rehearing for their denied Petition for Certiorari docket no. 02-1253. The supplemental authorities below support the Petitioners' view and Harvard University Professor Joseph William Singer's address in the SUPREME COURT'S ATTACK ON INDIAN SOVEREIGNTY in a symposium on Indian law at New England School of law, October, 2002 to be published in an upcoming New England Law Review article. He notes that "Nevada v. Hicks misstates precedent, ignores current congressional and presidential policy, and violates existing treaties." in excerpts of his address found at http://www.indiancountry.com/article/1055857097. See, *U. S. v. Enas*, 2001 U.S. App. LEXIS 14397, *46; 255 F3d 662 (2001) Unanimous En Banc cert denied, 122 S. Ct. 925 (2002) observing lack of Article III Constitutional analysis of Court's authority to diminish Indian Court authority). The subject matter jurisdictional authority of Indian Nation Courts, Federal Courts, Congress, and Executive to define the scope of Indian Nation Court authority is ripe for review and one of national importance. Petitioners assert that accepting these petitions will preserve all parties and Court's resources.

SUPREME COURT LAW

(A) *Nguyen v. United States*, 539 U.S. ____slip opinion, No. 01-10873, Decd' June 9, 2003* upholding Congress'

Article IV authority to make all needful rules and regulations respecting territories or possessions. [1]

(B) *American Ins. Assoc. v. Garmendi*, 539 U.S. ___, slip opinion, docket no. 02-722, Decided June 23, 2003 upholds Article II Executive authority in foreign affairs. "Generally, then, valid executive agreements are fit to preempt state law, just as treaties are,.... Subject, that is, to the Constitution's guarantees of individual rights. ....Id. page 17 fn. 9. Without Congressional *express divestiture* of Navajo Nation authority over non-Indians by statute or treaty, the Executive action here, a BIA-Navajo judicial program contract and funding agreement, should take precedence over Article III Court authority to diminish Indian Nation Court authority. [2] Here Navajo Court authority is over non-Indians seeking voluntarily to involve themselves in Navajo Court processes, which is an essential Indian internal affair, and the dismissal of Truck and Attorney Ickes should be reversed. 25 U.S.C. § 3651 (5) "tribal justice systems are an essential part of tribal

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[1] Here, the Tenth Circuit remanded this case for analysis under *Montana v. U. S.*, 450 U.S. 545(1981) and progeny, *where Courts diminish* Indian Nation authority. Conflicting, since 1981, *Congress* using plenary power upheld equal Indian Nation authority over all, by the Tribal Justice Support Act, 25 U.S.C. §§1301-1306 [1993] and the 2000 Technical Amendments 25 U.S.C. §§3631-3663, both identifying Tribal Courts as the *'most'* appropriate forums for disputes in Indian Country over *Indian and non-Indian alike.* S. Rep. No. 88 103d Cong, 1st Sess.8 (1993) H.R. Conf. Rep. No. 383, 103d Cong. 1st sess. 13 (1993).

[2] "Those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." Felix S. Cohen, Handbook of Federal Indian Law 122 (1941);" *MacArthur v. San Juan County*, 2002 U.S. App. LEXIS 20987 *14 appealed decision below

governments and serve as important forums for ensuring the health and safety and the political integrity of tribal governments". If orders are not enforceable, they can not ensure health and safety.

(C) *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. ____slip opinion, docket no. 01-1368, decided May 27, 2003, finding "In enacting the FMLA, Congress relied on two of the powers vested in it by the Constitution: its Article I commerce power and its power under §5 of the Fourteenth Amendment to enforce that Amendment's guarantees." Here, Congress in enacting the Indian Civil Rights Act and Self-Determination Act, Congress was expanding the 14th amendment guarantees to 'any person' within Indian Nation borders, consistent with Congress' Constitutional limitations "that is essentially a direction that all persons similarly situated should be treated alike." **[(D)]** See, *Lawrence v. Texas*, 539 U.S. _____, slip opinion, docket no. 02-102, dec'd **June 26, 2003** pg. (J. O'Connor, pg. 1 concurrence). Here, the Navajo Court by statute is MANDATED to treat all equally, by statute and contract, and yet, case law since 1978's *Oliphant v. Squamish Indian Tribe*, 1978 U.S. LEXIS 66, *26, 435 U.S. 191, will presume against equality under Indian law. There is no way the Navajo Court can be correct, by statute ***or*** by Court ruling, ***unless*** *this Court does a Constitutional analysis of its and Congress' and Executives' authority over Indian Treaty Nation jurisdictional authority.* . a daunting, insurmountable National conflict!

The Circuit Courts Have Split

8th Cir. *U. S. v. Lara* 2003 U.S. App. LEXIS 5685,*;324 F.3d 635 March 24, 2003 and **7th Cir.** *U. S. v. Long*, 2003 U.S. App. LEXIS 5492,*;324 F.3d 475 **split directly on the same questions asked by these petitioners**.... what is the root authority of Indian Nation Courts,

inherent sovereignty or Congressional delegation, and thus, the subject matter jurisdictional authority of Article I Congress, Article II Executive, and Article III Courts to define Indian Nation Jurisdictional authority, that this Court has found in *Oliphant* and *Nevada v. Hicks*, *supra*, extends to the criminal and civil context alike. *This 10th cir. case should be taken with these 7th and 8th circuit cases to prevent years of wasted judicial resources, appeals and de facto Congressional Indian Law nullification. Lara* is U. S. Supreme Court docket no. 02-1059 and *Long* is docket no. 02-1646. *Lara*'s petition is due July 22, 2003 and the Department of Justice is anticipated to support the position of the Petitioners that Congress defines Indian Court authority. **10th Cir.** *Seneca-Cayuga Tribe of Oklahoma et al v. National Indian Gaming Commission et al* 2003 U.S. App. LEXIS 7284,*;327 F.3d 1019, 10th Cir., April 17, 2003.[3] Upholds several Petitioner arguments. **10th Cir.** *Kennedy v. Hughes*, 60 Fed. Appx. 734; 2003 U.S. App. LEXIS 5475 *12, (unpublished) decided March 20, 2003 upholds Indian Nation forums as exclusive Courts for vindication of Indian Civil Rights Act violations found here. **8th Cir.** – *Penn v. U.S.*, 2003 U.S. App. LEXIS 6357,*9-10;324 F.3d 992, April 3, 2003, upholds Indian Court authority over nonmembers and facially valid order to give Indian Court judge immunity. **4th Cir.** – *Int'l Bancorp, LLC et al v. Societe Des Bains de Mer Et Du Cercle Des Etrangers a Monaco* 2003 U.S. App. LEXIS 9566,*10;329 F.3d 359; decided May 19,

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[3] defines 'Indian Country' the same way as the Navajo Nation and 18 U.S.C. §1151 [at fn.1]; as long as there is "legally cognizable interest in the outcome" the case is not moot [*22] noting actions of a party to try to make it moot sealing the orders from post trial review [*25]; upholds Congressional intent of its statutes [*39]; *Cheveron* deference should be given the Executive's carrying out a statutory scheme [*48-49][here a BIA-judicial program funding agreement demanding uniform and fair use of Navajo law].

2003 upholds the full broad scope of Article I §8 cl. 3 (the Congress shall have Power . . . to regulate Commerce with ..... Indian Tribes") still undiminished here.

28 U.S.C. 1738 Full Faith and Credit will Eliminate the Following Conflicts Between the Court and Congress and Executive Policies

This Court can *support* Tribal Authority over all equally; *support* Treaty Inherent Sovereignty not expressly divested by Congress; *support* congressionally -, BIA-Approved Indian Court orders; *support* Indian Civil Rights Act protections; *support* Indian Nation political integrity and safety; OR- eliminate all the above, dismiss non-Indian parties, and ignore Off reservation facially valid orders.

Full faith and credit for Indian rulings resolves all these conflicts. It is easy to see that unless these petitions are taken, no matter how the Federal court rules, it will be appealed, and resources of the Courts and the parties will be wasted for a question that is ripe now.

CONCLUSION

Based upon the foregoing supplemental authorities, the Petitions, docket no. 02-1253 and 02-1774 should be accepted by the Court and briefed by the parties.

Respectfully submitted,
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Supreme Court, U.S.
FILED
JUL 7 _ 2003
OFFICE OF THE CLERK

No. 02-1774

IN THE

Supreme Court of the United States

FRED RIGGS, DONNA SINGER, AND AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, Former County Commissioner BILL REDD, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICHARD BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, FARMER'S/TRUCK INSURANCE, attorney R. DENNIS ICKES, and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

ON PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS SAN JUAN COUNTY

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QUESTIONS PRESENTED

I. Should this Court instruct the Tenth Circuit Court of Appeals and/or the United States District Court, District of Utah, by a writ of mandamus, to enforce the Navajo Nation Tribal Court Orders against San Juan County Defendants under full faith and credit as set forth in 28 U.S.C. § 1738?

II. Should this Court issue a writ of prohibition against San Juan County and its commissioners, county administrator, and county attorney prohibiting their representation by a single private law firm?

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Respondents, San Juan County, Utah, San Juan County Commissioners J. Tyron Lewis, Lyn Stevens, and Manuel Morgan, former San Juan County Commissioner Bill Redd,[1] San Juan County Attorney Craig Halls, and San Juan County Administrator Rick Bailey (collectively "San Juan County Defendants") respectfully file this Brief in Opposition to Petition for Writ of Mandamus and/or Prohibition filed by Fred Riggs, Donna Singer, and Al Dickson ("Plaintiffs").

OPINIONS BELOW

The Findings, Opinion and Judgment at Preliminary Injunction, entered by the District Court of the Navajo Nation, Shiprock, New Mexico ("Navajo Tribal Court") on December 28, 1999, is reprinted in the appendix to the Petition for Writ of Mandamus and Prohibition. *(P. App. at 1a)*. The Navajo Tribal Court entered four additional orders in furtherance of the preliminary injunction: Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order *(P. App. at 33a)*; Special Order in Aid to Satisfaction of Preliminary Injunction *(P. App. at 53a)*; Order Mandating That All Defendants to Be Bound by the Preliminary Injunction Order *(P. App. at 55a)*; and Order Clarifying the March 1, 2000 Order *(P. App. at 58a)* (collectively, the "Tribal Court Orders").

---

1. At the time the lawsuit was filed in Navajo Tribal Court, Plaintiffs named San Juan County Commissioners J. Tyron Lewis and Bill Redd in both their official and personal capacities, and San Juan County Commissioner Mark Maryboy in his official capacity only. The current San Juan County Commissioners, Manuel Morgan and Lyn Stevens, have been substituted for Bill Redd and Mark Maryboy pursuant to Fed. R. Civ. P. 25(d) and are named only in their official capacities. Bill Redd remains in the lawsuit in his personal capacity only and Mark Maryboy has been dismissed.

A Memorandum Decision and Order was entered on October 30, 2000, by the United States District Court, District of Utah, denying Plaintiffs' request for enforcement of the Navajo Tribal Court's preliminary injunction with respect to San Juan County Defendants. This decision was certified for interlocutory appeal on March 7, 2001 and is reprinted in the appendix to San Juan County Defendants' Brief in Opposition to Petition for Writ of Certiorari and Prohibition. *(R. App. at 1a).*

The opinion of the United States Court of Appeals for the Tenth Circuit was entered on October 7, 2002, and is reported as *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002). *(P. App. at 121a).* On November 8, 2002, the Tenth Circuit denied Plaintiffs' Petition for Panel Rehearing and San Juan County Defendants' Petition for Rehearing En Banc. *(R. App. at 15a).* On February 20, 2003, the Tenth Circuit denied Plaintiffs' Petition for Writ of Mandamus. *(P. App. at 119a).*

Plaintiffs filed a Petition for Writ of Certiorari with this Court, Docket No. 02-1253, which the Court denied on June 2, 2003. Plaintiffs filed a Petition for Writ of Mandamus and/or Prohibition on May 28, 2003, Docket No. 02-1774, prior to the Court's denial of their Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has the authority to issue a writ of mandamus and/or a writ of prohibition under 28 U.S.C. § 1651(a) and Rule 20 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISION, STATUTES AND RULE

U.S. Const. art. IV, § 1

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State; And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1738, which provides in pertinent part:

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1651(a)

> The Supreme Court and all courts established by an act of congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

United States Supreme Court Rule 20.1

> Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter or right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

San Juan County, a political subdivision of the State of Utah, acting through its Commissioners, exercised the statutory authority given to it by the Utah Legislature and created the San Juan Health Services District ("Health Services District") to facilitate the delivery of medical care to residents of a remote area of San Juan County. By statute, the Health Services District is a distinct and independent entity, separate from San Juan County. The Health Services District operated the Montezuma Creek Clinic (the "Clinic") which provided outpatient care to Navajo Tribe members

pursuant to a contract with Indian Health Services, a federal agency. The Clinic is situated on fee land owned by the State of Utah as part of the Utah Navajo Trust Fund. Neither the facility nor the land is owned by San Juan County.

Singer, Riggs, and Dickson (collectively, "Plaintiffs"), were employed at the Clinic. Singer served as the Clinic's manager, Riggs was a physicians' assistant, and Dickson was an office clerk. Both Riggs and Dickson are Navajo Tribe members; Singer is a non-Indian married to a member of the Navajo Tribe. When the Clinic's contract with Indian Health Services expired on December 31, 1999, the operation of the Clinic was transferred to Utah Navajo Health Systems, Inc., a non-profit organization affiliated with the Navajo Tribe.

On April 12, 1999, prior to the transfer of the Clinic's operations to Utah Navajo Health Systems, Plaintiffs sued San Juan County Defendants, and others, in the Navajo Tribal Court, alleging violations of the Navajo Preference in Employment Act at the Clinic. The Plaintiffs' objective was to compel the continued operation of the Clinic and to reinstate certain discharged employees, including Singer, who had been fired for fraud, embezzlement and other misconduct. Plaintiffs also brought 42 U.S.C. § 1983 claims for civil rights violations and a variety of state common law tort claims.

On the same day that Plaintiffs filed suit, Singer obtained a Restraining Order from the Navajo Tribal Court requiring San Juan County Defendants to return her "to her management position," award to her back pay and other benefits, turn over control of the Clinic to a "Special Master" to be paid for by all Defendants, expunge Singer's personnel file of all records referring to "fraud," "misconduct," and

"other violations," prohibiting San Juan County Defendants and the other Defendants from entering onto the Clinic property without the Special Master's approval and ordering them not to charge Navajo patients for medical care, regardless of whether that medical care was provided at the Clinic or some other off-reservation Health Services District facility. On June 22, 1999, San Juan County Defendants answered the Navajo Tribal Court Complaint and raised both sovereign immunity and lack of subject matter jurisdiction as affirmative defenses.

The Navajo Tribal Court entered its Findings, Opinion and Judgment on December 28, 1999, requiring San Juan County Defendants to reinstate Singer and the other Plaintiffs with back pay and benefits, as well as pay their attorneys' fees. The Navajo Tribal Court also ordered that medical services were not to be eliminated at the Clinic, that a Special Master was to be placed in charge of that facility, that San Juan County Defendants were not allowed on the Clinic's premises without permission of the Special Master, and that Navajo patients were not to be billed for the medical care they received, regardless of whether that medical care was provided at the Clinic or some other off-reservation facility.

Subsequently, the Navajo Tribal Court entered another Order on March 1, 2000, denying San Juan County Defendants' Motion to Dissolve or Modify Preliminary Injunction. In this same Order, the Navajo Tribal Court again ordered the reinstatement of Singer and other employees with back pay and benefits even though the Clinic's operations had been transferred two months earlier to Utah Navajo Health Systems. The Navajo Tribal Court also ordered San Juan County Defendants not to interfere with the operation of the Clinic, not to eliminate any medical services at the

Clinic and to cease billing Navajo patients for medical care regardless of whether that care was received at a facility on the reservation or off the reservation. Additionally, and without a hearing, the Navajo Tribal Court imposed a $10,000 per day fine for each day its orders were not complied with and further ordered that "every personal Defendants and Defendants counsel will pay $1,000 per day of the $10,000 daily fine from their own personal assets."

On March 2, 2000, the Navajo Tribal Court entered a "Special Order" granting Plaintiffs leave to sue in "any Utah or Federal Court" to enforce the Tribal Court Orders. Plaintiffs then brought suit in the United States District Court, District of Utah ("District Court"), against San Juan County Defendants and others. The plaintiffs in the District Court included the Plaintiffs and other individuals. The Complaint filed in the District Court sought, among other relief, enforcement of the Tribal Court Orders against San Juan County Defendants. In addition, Plaintiffs asserted numerous additional claims against San Juan County Defendants. San Juan County Defendants moved to dismiss Plaintiffs' claim for enforcement of the Tribal Court Orders on the basis of sovereign immunity and the District Court granted their motion on October 30, 2000. On March 7, 2001, the District Court certified its October 30, 2000 Order for appeal to the Tenth Circuit. The sole issue certified for appeal, which pertains to San Juan County Defendants and Health District Defendants, was whether they were immune from suit in Navajo Tribal Court. *(R. App. at 4a)*. Subsequently, the Tenth Circuit vacated the dismissal of San Juan County Defendants by the District Court and remanded the matter for further proceedings, stating "it would be premature to decide the sovereign immunity question because there remains a threshold question of the tribe's jurisdiction under *Montana*."

MacArthur v. San Juan County, 309 F.3d at 1226. At the direction of the District Court, all parties filed briefs on the issue of subject matter jurisdiction under *Montana*. As of the filing of this Brief, the District Court has not yet ruled on that issue.

Without waiting for the District Court decision on subject matter jurisdiction, Plaintiffs filed a Petition for Writ of Certiorari with this Court on February 6, 2003, which was denied on June 2, 2003, and this Petition for Writ of Mandamus and/or Prohibition on May 28, 2003.

REASONS FOR DENYING THE PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

Plaintiffs ask this Court for a writ of mandamus granting the Tribal Court Orders full faith and credit under 28 U.S.C. § 1738. San Juan County Defendants respond that a writ of mandamus is inappropriate because Plaintiffs have not exhausted their available remedies in the lower courts. More importantly, the District Court has not yet ruled on whether the Navajo Tribal Court had subject matter jurisdiction over San Juan County Defendants, a question presented on remand by the Tenth Circuit Court of Appeals. *MacArthur v. San Juan County*, 309 F.3d at 1228. Even if mandamus were an appropriate remedy, Plaintiffs do not have a clear and undisputed right to the relief they request.

In addition to a writ of mandamus, Plaintiffs inappropriately seek a writ of prohibition against the representation of San Juan County Defendants by one law firm. San Juan County Defendants respond that the United States Supreme Court is an inappropriate forum to seek prohibition of a "unified defense" because again, Plaintiffs

have not exhausted their remedies in the lower courts. Moreover, Plaintiffs have no standing to assert that there may be conflicts of interest among San Juan County Defendants, prohibiting representation by a single, private law firm; any dispute as to San Juan County Defendants' representation belongs to them, not Plaintiffs. Thus, Plaintiffs are not entitled to the requested relief. These issues are addressed in more detail below.

I. PLAINTIFFS' INAPPROPRIATE REQUEST FOR A WRIT OF MANDAMUS IS AN ATTEMPT TO CIRCUMVENT LOWER COURT ADJUDICATION.

Plaintiffs petition this Court to issue a writ of mandamus, ordering enforcement of the Tribal Court Orders under full faith and credit. However, Plaintiffs cannot meet the established criteria upon which a writ of mandamus is based. The All Writs Act is the source of this Court's authority to issue a writ of mandamus and/or prohibition:

> The Supreme Court and all courts established by an act of congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a). The issuance of these extraordinary writs is aided by Rule 20 of the United States Supreme Court Rules which calls for a petitioner to show (1) that the writ will be in aid of appellate jurisdiction, (2) that exceptional circumstances warrant the exercise of the Court's discretionary powers, and (3) that adequate relief cannot be obtained in either form or in any other court. Sup. Ct. R. 20. *See, e.g., Ohio Citizens For Responsible Energy, Inc. v.*

Nuclear Regulatory Com'n, 479 U.S. 1312, 1313, 107 S. Ct. 682, 683 (1986) (the issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised).

Writs of mandamus and/or prohibition, like equitable remedies, may be granted or withheld in the sound discretion of this Court. *Ex parte Republic of Peru*, 318 U.S. 578, 63 S. Ct. 793 (1943). Petitions for these writs are usually denied where other adequate remedies are available. *Id.* To obtain these writs, petitioners must show that they lack adequate alternative means to obtain the relief they seek; they also carry the burden of showing that their right to issuance of the writ is clear and indisputable. *Mallard v. U.S. Dist. Court for Southern Dist. Of Iowa*, 490 U.S. 296, 109 S. Ct. 1814 (1989). *See also Heckler v. Ringer,* 466 U.S. 602, 104 S. Ct. 2013 (1984) (common law writ of mandamus is intended to provide a remedy for a plaintiff only if he has exhausted all avenues of relief and only if the defendant owes him a clear, nondiscretionary duty) and *Kerr v. U.S. Dist. Court for Northern Dist. Of California*, 426 U.S. 394, 96 S. Ct. 2119 (1976) (party seeking issuance of writ of mandamus must have no other adequate means to attain the relief he desires and must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable).

In addition, extraordinary writs are reserved for extraordinary causes, and then only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Platt v. Minnesota Min. & Mfg. Co.*, 376 U.S. 240, 84 S. Ct. 769 (1964). Plaintiffs have failed to show that they have no alternative means, or that they even have a right to require the enforcement of the Tribal Court Orders under full faith and credit.

A. Whether the Tribal Court Orders Should Be Enforced under Full Faith and Credit Should Not Be Considered Until the District Court Decides Whether the Navajo Tribal Court Has Subject Matter Jurisdiction.

The issue of whether the Tribal Court Orders are entitled to full faith and credit should not even be considered until the District Court has decided the question of subject matter jurisdiction. Federal courts must not recognize nor enforce tribal court judgments if the tribal court does not have subject matter jurisdiction. *Wilson v. Marchington*, 127 F.3d 805, 810 (9th Cir. 1997) (holding that "federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of law").

In this action, the appeal process began when the Honorable Dale A. Kimball of the District Court granted Plaintiffs' Rule 54(b) motion. The single issue certified for appeal which pertains to the San Juan County Defendants, was whether San Juan County Defendants were entitled to sovereign immunity. *(R. App. at 4a)*. As Plaintiffs admitted to the Tenth Circuit, "they did not argue full faith and credit in the Federal [district] Court . . . [but] Plaintiffs now argue full faith and credit is appropriate for exclusively tribal claims under the facts of this case." *MacArthur v. San Juan County*, 309 F.3d at 1225. The Tenth Circuit appropriately responded that it does not consider an issue on appeal that was not pressed below and would not do so now. *Id.* Instead, the Tenth Circuit ruled that the District Court should have conducted an inquiry into the subject matter jurisdiction of the Navajo Tribal Court prior to addressing the sovereign immunity question and remanded the case to District Court for such

consideration. Although briefed by San Juan County Defendants and Health District Defendants, and several times by Plaintiffs, the District Court has not yet reached a decision on that issue. Accordingly, until a decision on subject matter jurisdiction is reached, and then a subsequent decision regarding whether the District Court correctly ruled that San Juan County Defendants are entitled to sovereign immunity, the question of whether the Tribal Court Orders are entitled to full faith and credit is not ripe for consideration.

B. The Writ of Mandamus Cannot Be Used to Enforce Tribal Court Orders When There Are Still Options Available in the Lower Courts.

Plaintiffs seek to completely bypass the judicial proceedings available to them in the lower courts by requesting a writ of mandamus to enforce the Tribal Court Orders against San Juan County Defendants under 28 U.S.C. § 1738. Normally, a writ of mandamus turns on equitable considerations, as this Court held in *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 53 S. Ct. 614 (1933). However, granting Plaintiffs' request for full faith and credit of the Tribal Court Orders under a writ of mandamus requires that this Court depart from the well-settled rule that a writ of mandamus may not be employed to secure the adjudication of a disputed right for which an ordinary suit affords an equally adequate and complete remedy. *See United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540, 544, 57 S. Ct. 855, 857 (1937) (citations omitted).

The first time Plaintiffs addressed the full faith and credit issue, as applied to San Juan County Defendants, was in their appeal to the Tenth Circuit. *San Juan County v. MacArthur*, 309 F.3d at 1225. As noted in subsection A. above, the Tenth

Circuit appropriately refused to consider whether full faith and credit applied to Tribal Court Orders because Plaintiffs had not raised that issue in the district court. *Id.* Plaintiffs should not be allowed to circumvent appropriate judicial proceedings by way of an extraordinary writ simply because they did not avail themselves of the opportunity to raise this issue in the lower courts.

C. Plaintiffs Have No Right to Full Faith and Credit Because It Does Not Apply to Tribal Court Orders.

Even if a writ of mandamus was the appropriate avenue for relief, Plaintiffs are still not entitled to the enforcement of the Tribal Court Orders under full faith and credit. To determine whether full faith and credit applies to the Tribal Court Orders, the Court should begin by reviewing the Full Faith and Credit Clause as set forth in the United States Constitution and its enabling statute at 28 U.S.C. § 1738. The United States Constitution's Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1. It is obvious that the Full Faith and Credit Clause applies only to states and the United States Constitution is silent about the recognition of tribal court judgments, even though it specifically addresses other tribal concerns. *See Wilson v. Marchington*, 127 F.3d at 808. Since the Full Faith and Credit Clause does not apply to tribal court judgments, the next step is to determine whether

28 U.S.C. § 1738, which provides for full faith and credit among "states, territories and possessions" of the United States, may be used to grant full faith and credit to the Tribal Court Orders.

It is true that in some circumstances, judgments of tribal courts, as to matters properly within their jurisdiction, have been regarded as entitled to full faith and credit in other courts. In *Wilson*, the court noted that certain federal statutes specifically extended full faith and credit to Indian tribes such as the Indian Land Consolidation Act, 25 U.S.C. §§ 2201-2211 (extending full faith and credit for actions involving trust, restricted or controlled lands) and the Maine Indian Claims Settlement Act, 25 U.S.C. § 1725(g) (requiring certain tribes and the State of Maine to give full faith and credit to each other's judicial proceedings). *Id.* Another example is the Indian Child Welfare Act ("ICWA") which specifically vests tribal courts with jurisdiction over certain child custody and placement matters. ICWA expressly provides that decisions of a tribal court on these matters are entitled to full faith and credit. 25 U.S.C. § 1911(d). But outside of child custody and placement under ICWA, and other limited areas with statutory authorization, courts will not recognize tribal court judgments as being entitled to full faith and credit. *Wilson v. Marchington*, 127 F.3d at 808. The *Wilson* court reasoned that if Congress had specifically intended to include Indian tribes under 28 U.S.C. § 1738, it could have done from the inception of the statute or with a subsequent amendment. *Id.* Congress did not choose that path and instead, created specific exemptions in cases of Indian child custody disputes and Indian land trusts. *Id.*

Likewise, states have the statutory power to extend full faith and credit to tribal court judgments and many have used that power for specific circumstances, such as the

enforcement of protective orders and adoption decrees. *See, e.g.*, A.R.S. § 13-3602 (full faith and credit for protective orders) and N.R.S. § 127.017 (full faith and credit to judicial proceedings for adoption). Although a few other states have extended full faith and credit more broadly, it is still done by statutory authority. *See, e.g.*, 12 Okl. St. Ann. § 728 (permitting the Supreme Court of the State of Oklahoma to extend full faith and credit to tribal court judgments), W.S.A. § 806.245 (granting full faith and credit to Wisconsin Indian tribal courts), W.S. 1977 § 5-1-111 (granting full faith and credit to certain tribes for tribal acts and records).[2] If tribal court judgments were automatically entitled to full faith and credit under 28 U.S.C. § 1738, there would be no need for the states or Congress to enact enabling legislation. *See, e.g.*, *Erlenbaugh v. United States*, 409 U.S. 239, 243-244, 93 S. Ct. 477, 480 (1972) (a later legislative act can be regarded as a legislative interpretation of an earlier act and "is therefore entitled to great weight in resolving any ambiguities and doubts." (quoting *United States v. Stewart*, 311 U.S. 60, 64-65, 61 S. Ct. 102, 105 (1940)).

The decision to extend full faith and credit to tribal court judgments is within the power of Congress or the states. It is not within the power of the federal judiciary. Since Congress has declined to grant tribal court judgments full faith and credit except in specific instances, and since the State of Utah has no statute or precedent extending full faith and credit to tribal court judgments except as required by ICWA, Plaintiffs cannot ask this Court to make an exception to established law.

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2. Other states which have statutory authority to grant full faith and credit under certain circumstances to tribal court judgments are Colorado, District of Columbia, Idaho, Indiana, Maryland, Minnesota, Nebraska, New Mexico, New York, North Carolina, Oregon, South Carolina, Washington, and West Virginia.

II. PLAINTIFFS LACK STANDING TO SEEK THE PROHIBITION OF SAN JUAN COUNTY DEFENDANTS' UNIFIED DEFENSE.

Plaintiffs argue that San Juan County Defendants' unified defense is a conflict of interest among themselves, thus denying Plaintiffs' due process rights. They claim that San Juan County itself should have separate representation from its Commissioners. For support, Plaintiffs rely on Rule 1.13 of the Model Rules of Professional Conduct which applies to government attorneys, such as the County Attorney who is a defendant in this lawsuit, not to attorneys in a private law firm. Originally, Plaintiffs raised this issue in District Court and were defeated. *(R. App. at 1a).* Plaintiffs cannot show that they are entitled to such relief from this Court.

A. Plaintiffs Have Not Exhausted Their Legal Remedies.

Although Plaintiffs objected to San Juan County Defendants' representation in District Court, their motion was defeated. *(R. App. at 9a-10a, 13a).* Plaintiffs may still appeal this issue, among their other contentions, once the District Court rules on all the issues presented to it and a final judgment is entered.

B. Plaintiffs Lack Standing to Request the Prohibition of a Unified Defense.

It is difficult, to say the least, to understand how San Juan County Defendants' representation by a single law firm is a denial of Plaintiffs' due process rights. As support, Plaintiffs mistakenly look to Rule 1.13 of the Model Rules of Professional Conduct to attack San Juan County

Defendants' representation by a private law firm. A comment from Rule 1.13, cited in Plaintiffs' brief, notes that "a lawyer for the government may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions, including investigation and prosecution." These duties belong to the San Juan County Attorney. *See* Utah Code Ann. § 17-18-1 to -5 (enumerating the duties of a county attorney). Private law firms cannot conduct official investigations and prosecutions and it is ludicrous to think that a private attorney could turn around and prosecute his or her own client. Hence, Plaintiffs' reliance on Rule 1.13 is misplaced. As the Tenth Circuit noted, "[a]n attorney has no duty . . . to protect the interests of a non-client adverse party for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services and that the attorney's undivided loyalty belongs to the client." *MacArthur v. San Juan County*, 309 F.3d at 1224 (citations omitted).

Moreover, the District Court has already ruled once on this very issue. Plaintiffs brought a motion before the District Court to disqualify counsel, alleging that conflicts of interest existed because the commissioners, sued in their official capacity and personal capacity, could have conflicts of interest with each other and with San Juan County. Thus, Plaintiffs argued that having the same lawyer for the commissioners and San Juan County was a conflict of interest. The District Court denied Plaintiffs' motion on the grounds that "Plaintiffs have failed to identify any conflict, let alone a conflict that would grant them standing to seek disqualification." *(R. App. at 10a)*. The Model Rules of Professional Conduct have already provided for potential conflicts that may arise under Rule 1.7's conflict procedure. Any dispute over an existing conflict of interest and all that

it implies belongs to San Juan County Defendants and any other co-defendants. It does not belong to Plaintiffs nor does it affect their due process rights.

In addition, Plaintiffs have not produced any evidence demonstrating the existence of an actual injury, or even imminent injury, which would allow Plaintiffs the right to direct San Juan County Defendants' choice of representation. Under the standing requirements, Plaintiffs have the burden of establishing the following elements: (1) they have suffered an injury-in-fact; (2) a causal connection between injury and conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992). Once a lawsuit has progressed past the pleading stage, allegations based upon mere conjecture and speculation are insufficient to support a claim of injury. *Id.*

Plaintiffs demand the disqualification of San Juan County Defendants' counsel, based upon the mere presumption that there are conflicts of interest among San Juan County Defendants. However, Plaintiffs fail to meet the requirements for standing and are not entitled to their requested relief. First, Plaintiffs have failed to show that they have actually suffered an injury or that an injury is even imminent. Plaintiffs allege that if the San Juan County Defendants are represented by a single private law firm, then that representation prohibits investigation and prosecution of county officials for wrongdoing. *(P. Brief at 28)*. Plaintiffs have not offered any factual support or evidence in support of this allegation, notwithstanding the fact that a private law firm does not conduct investigations or prosecute malfeasant officials. Nonetheless, Plaintiffs apparently believe that this blanket pronouncement should be reason enough to prohibit

a unified defense. Even if there are conflicts among San Juan Defendants, which there are not, Plaintiffs have not shown that they are affected by such alleged conflicts and thus have not sustained any injury-in-fact.

Moreover, under Rule 1.7, a party must demonstrate that opposing counsel had inappropriate contact with represented parties in order to seek disqualification of an opposing party's counsel. Plaintiffs do not seek disqualification of San Juan County Defendants' counsel under Rule 1.7 but based upon alleged conflicts among all Defendants. Because Plaintiffs have failed to even show that an actual injury has occurred, it is unnecessary to address prongs two and three of the standing test. For the reasons set forth above, Plaintiffs do not have standing to request the prohibition of a unified defense of San Juan County Defendants. Whether there is a conflict of interest among San Juan County Defendants or not, it is irrelevant to Plaintiffs' pursuit of this lawsuit.

III. SAN JUAN COUNTY DEFENDANTS SHOULD BE AWARDED DAMAGES AND COSTS PURSUANT TO SUP. CT. R. 42.2.

Plaintiffs filed a Petition for Writ of Certiorari (Docket No. 02-1253) which this Court denied. Plaintiffs then sought review of that denial pursuant to Sup. Ct. R. 44(a). Now Plaintiffs have filed this Petition for Writ of Mandamus and/or Prohibition asking for the same relief with slightly different arguments. This is a frivolous attempt to bypass ordinary judicial proceedings and use this Court's authority to obtain enforcement of the Tribal Court Orders. San Juan County Defendants have incurred significant costs and fees in responding to the Petition and the subsequent motion to expedite the proceedings. Pursuant to Sup. Ct. R. 42.2,

San Juan County Defendants should be awarded the attorneys' fees and costs associated with their response to the Petition for Writ of Mandamus and/or Prohibition.

CONCLUSION

For the foregoing reasons, San Juan County Defendants respectfully request that the Court deny the Petition for Writ of Mandamus and/or Prohibition, and award to them their attorneys' fees and costs incurred in responding to the same.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION DATED MARCH 6, 2001 AND RECEIVED MARCH 7, 2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

No. 2:00CV584K

DR. STEVEN MACARTHUR et al.,

Plaintiffs,

v.

SAN JUAN COUNTY et al.,

Defendants.

ORDER

This matter is before the court on (1) Plaintiffs' Motion for Rule 54(b) Certification As to the October 30 and December 13 Orders, (2) Defendant R. Dennis Ickes' Motion to Dismiss, (3) Defendants' Joint Motion for a Protective Order Regarding Mark Maryboy or in the Alternative to Disqualify Plaintiffs' Counsel, and (4) Plaintiffs' Motion to Disqualify Defendants' Counsel. A hearing on these motions was held on February 13, 2001. At the hearing, Plaintiffs were represented by Susan Schildmeyer, the San Juan County Defendants were represented by Jesse Trentadue, the Health District Defendants were represented by Carolyn Cox, Truck was represented by Kyle Finch via telephone, and Dennis Ickes represented himself.

Appendix A

At the hearing, Mr. Doug Short requested that he be allowed to represent Mr. Maryboy, and Defendants objected to his representation. Accordingly, the court ordered that the parties file simultaneous briefs on that issue by February 23, 2001. The court has also addressed that issue in this Order.

Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to these motions and has considered the subsequent briefing filed by the parties related to Doug Short's proposed representation of Mr. Maryboy. Now being fully advised, the court renders the following Order.

I. PLAINTIFF'S RULE 54(b) MOTION

Plaintiffs seek certification pursuant to Rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)") of the court's Orders dated October 30, 2000 and December 13, 2000 (the "October 30 Order" and the "December 13 Order," respectively) because of their national importance. Plaintiffs also apparently believe that the court's rulings in those two Orders constitute "final orders on the entire case," stating that "[i]t is difficult to imagine that the Court has anything left to say" and that the court "wisely stated that no matter how the Court rules, the *entire* case would go up on appeal." Thus, Plaintiffs have already appealed their *entire* case, including issues that have not been touched upon by this court.

This court has never indicated that the *entire* case would go up on appeal after the court issued its December 13 Order, as the court has not even begun to address most of the issues that

remain in this case. It is clear that the only issue that was addressed by the court in the October 30 Order was whether the County Defendants and the Health District Defendants, as they are defined in that Order, were immune from suit in the Navajo Tribal Court, thereby precluding this court from enforcing the Tribal Court Orders against them. *See* October 30 Order at 1 & n.2, 2-3, 21; *see also* Order Dated September 14, 2000 at 2-3 (setting forth what will be heard by the court at the October 5, 2000 hearing). In the October 30 Order, this court found that they were immune from suit in the Tribal Court and therefore declined to enforce the Tribal Court's Orders against them.

Similarly, the issues that were addressed by the December 13 Order were whether the Tribal Court Orders should be enforced against Defendants Truck Insurance Company ("Truck") and/or R. Dennis Ickes ("Mr. Ickes"). That Order also addressed whether the court would reconsider its October 30 Order finding that County Defendants and Health District Defendants were immune from suit in the Tribal Court, based on Plaintiffs' "new case law" and their motion urging the court to find the Utah Governmental Immunity Act unconstitutional. *See* December 13 Order.

In the case presently before this court, Plaintiffs appear to have numerous claims remaining, including (1) discrimination and denial of equal protection; (2) denial of free speech and association; (3) lack of due process; (4) anti- trust violations and RICO actions/Utah's Unfair Practices Act (which appears to include claims of restraint of trade, conspiracy against rights, deprivation of rights under color of law, obstruction of justice, obstruction of state or local law enforcement, interference with commerce, extortion, collection of an unlawful debt, tampering

and retaliating against a witness, and mail fraud); (5) fraud, conversion and theft of public funds and facilities; (6) invasion of privacy and criminal and civil defamation; (6) medical malpractice; and (7) takings and deprivation of public benefits and assistance. This court has never ruled upon any of these claims. Rather, the court has only ruled upon Plaintiffs' request for declaratory judgment that the Tribal Court Orders are enforceable against Defendants.

Despite Plaintiffs' misunderstanding of the court's October 30 and December 13 Orders, however, the court agrees that the questions at issue in the two Orders are issues of national importance, and the court finds that there is no just reason for delay and expressly directs the entry of judgment on Plaintiffs' claim pursuant to Rule 54(b). However, the court emphasizes that the only claim being certified is Plaintiffs' claim for declaratory judgment that the Tribal Court Orders are enforceable against Defendants. The issues raised by that claim are the issues addressed in the October 30 and December 13 Orders, which are (1) whether the County Defendants and Health District Defendants were immune from suit in the Navajo Tribal Court; and (2) whether the Tribal Court Orders are enforceable against Truck and Mr. Ickes. No other claim may be appealed.

Also, despite Plaintiffs' request in their 54(b) motion to stay the case while this claim is appealed, they have now filed a Motion for a Temporary Restraining Order and a "Motion for a More Definite Statement and Motion to Shift the Burden of Proof and Dismiss all Immunity Affirmative Defenses." Defendants, too, requested that the case be stayed if the 54(b) certification was granted. The court, however, declines to stay the case pending appeal of the issues in the October 30 and December 13 Orders.

Thus, briefing on the Plaintiffs' TRO request will remain as previously scheduled. Defendants' responses to Plaintiffs Motion for a More Definite Statement, etc., will be due on March 14, 2001. Plaintiffs' reply will be due on March 28, 2001. The court will soon schedule a hearing on these pending motions, along with Defendants' Motion to Dismiss Mark Maryboy.

II. ICKES' MOTION TO DISMISS

Mr. Ickes filed a motion to dismiss in August 2000, arguing that, viewing the complaint in a light most favorable to Plaintiffs, they have not alleged a claim against him that would entitle them to relief and that they have not demanded any remedy against Mr. Ickes by name or by class of defendants.

In this court's December 13 Order, the court stated that, given the court's ruling regarding Ickes and Truck, it was hard to imagine how Plaintiffs had any legitimate claims against either of these defendants in this court. Accordingly, the court requested that, if Plaintiffs believed they had any meritorious arguments pertaining to why Ickes and Truck should not be dismissed, to file a brief to that effect by a certain date.

Plaintiffs responded by arguing that it would be premature to dismiss Mr. Ickes because Plaintiffs had already appealed the case and, until the Tenth Circuit rules on immunity and other issues, any ruling to dismiss Ickes would be premature. Plaintiffs then proceeded to re-argue that this court lacks jurisdiction to deny the Tribal Court's sovereign authority to control is own processes, etc., and that the Tribal Court had jurisdiction over Ickes. Thus, Plaintiffs failed to provide the court with any legitimate claim that remained against Mr. Ickes. Plaintiffs also

failed to address whether they had any remaining claims against Truck, even though the court reminded them again, in an Order dated January 19, 2001, granting an enlargement of time to respond, that, Plaintiffs should address whether there were any reasons to keep Truck in this lawsuit.

Thus, Plaintiffs have failed to provide any basis for keeping Ickes or Truck in this lawsuit and this court is unaware of any reason that justifies keeping them in. Accordingly, Mr. Ickes and Truck are both dismissed with prejudice.

III. DEFENDANTS' JOINT MOTION FOR A PROTECTIVE ORDER OR TO DISQUALIFY COUNSEL

All the Defendants have filed a Joint Motion for Protective Order Regarding Mark Maryboy or in the Alternative to Disqualify Plaintiff's Counsel. Defendants claim that Schildmeyer has had ex parte communications with Commissioner Maryboy, who is a represented party opponent, in violation of Rule 4.2 of the Utah Rules of Professional Conduct.

In addition, Susan Schildmeyer has written a letter to Defendants, stating that she is representing Commissioner Maryboy in his individual capacity, which, Defendants claim, violates of Rule 1 .7. Defendants claim that Ms. Schildmeyer's "egregious misconduct" has severely prejudiced them in their ability to defend themselves in this lawsuit, meriting a protective order or her disqualification. Specifically, Defendants argue that (1) she should not be allowed to represent Maryboy; (2) that she should be ordered not to communicate with him, except through counsel and according to the specific procedures

explained in the comment to Rule 4.2; (3) that she should be prohibited from communicating with him regarding anything other than policy matters, and she should be prohibited from obtaining information or documents that he obtains through his position as a County Commissioner in connection with this lawsuit; (4) she should be ordered not to communicate with him concerning any privileged, work product, or other confidential matters that pertain to this lawsuit or any other claims against the County; (5) Commissioner Maryboy should also be ordered not to communicate with Ms. Schildmeyer regarding the above, except through his attorney or established discovery procedures; and (6) in the event Ms. Schildmeyer violates the order she should be disqualified or otherwise sanctioned.

Defendants also request an accounting of all her communications with Maryboy and any other Defendant. They contend that Ms. Schildmeyer come forward with a complete accounting of (1) all communications she has had with any Defendants, whether directly or though an agent; (2) all information she has received from any Defendant; and (3) all materials or documents she has obtained or reviewed that came from any Defendant, directly or through an agent. Defendants want this to be under oath and on the record, preferably in open court to avoid later disputes about what was obtained through inappropriate means.

Finally, if Ms. Schildmeyer is not disqualified, Defendants request that Ms. Schildmeyer be ordered to obtain permission from the court before filing any additional pleadings because of the "repeated voluminous, meritless, and unnecessary pleadings she has filed."

Appendix A

Stripped of the accusations of racism and other inflammatory comments about Defendants, Ms. Schildmeyer appears to claim that there is nothing wrong with representing someone that her clients have sued because they sued him in only his official capacity.

The court agrees with Defendants that the Rules of Professional Conduct prevent Ms. Schildmeyer from talking to Mr. Maryboy and certainly prevent her from representing Mr. Maryboy. Accordingly, the court will enter a protective order similar to that requested by Defendants, except that the court will not order Mr. Maryboy to refrain from talking to Ms. Schildmeyer. In addition, Ms. Schildmeyer is ordered to provide a complete accounting of (1) all communications she has had with any Defendants, whether directly or though an agent; (2) all information she has received from any Defendant; and (3) all materials or documents she has obtained or reviewed that came from any Defendant, directly or through an agent. Such information should be provided by affidavit to Defendants by March 21, 2001.

In addition, although the court is sympathetic to Defendants' request that Plaintiffs be required to obtain permission of the court before filing any additional pleadings, the court will not enter such a broad order at this time. However, in future filings, Plaintiffs, should exercise discretion in terms of subject matter, content, and length of their filings. For example, Plaintiffs should (1) refrain from filing additional memoranda on issues that have already been briefed and argued, (2) refrain from re-drafting and re-filing motions and memoranda just prior to when Defendants' opposition memoranda are due on the original motion; (3) temper their use of hyperbole and inflammatory

language, and (4) attempt to secure extensions of time from opposing counsel. As of today, Plaintiffs have at least two motions that are currently being briefed. Until these two motions are ruled upon by the court, Plaintiffs are not to file any further motions unless the court grants leave to do so. Failure to comply with these requests will result in an order requiring Plaintiff to seek permission to file anything in this case and/or the court's striking Plaintiffs' pleadings.

IV. PLAINTIFFS' MOTION TO DISQUALIFY COUNSEL

Plaintiffs request an Order disqualifying all of Defendants' counsel from their current representation of Defendants and appointing one counsel as fiduciary for the County, one as a fiduciary for the District, and individual counsel for each Defendant. Plaintiffs claim that there are conflicts of interest in this "unified defense" approach. Plaintiffs argue that they have tried to settle with five individual defendants, but there has to be absolute confidentiality of the details before the offer is conveyed because the offers would disclose Plaintiffs' attorney client communications and expose litigation strategy. Plaintiffs appear to argue that, if the individuals are represented in both their individual and official capacities, then there is no way to settle confidentially with the individuals without their "official capacity" counsel knowing about the terms of the settlement and then sharing the information among themselves.

Plaintiffs argue, without providing facts, that the County has conflicts with the individual County employees/officials and that the individuals have conflicts with each other. Plaintiffs also requests that this court convene a grand jury "and otherwise

order or request the U.S. Attorney's office or Department of Justice or Government Accounting Office to track the federal funds coming into San Juan County and San Juan District for the last several years." Plaintiffs claim that the Defendants' counsel should be representing the *people* of the County-not the wrongdoers.

In general, Defendants argue that Plaintiffs have failed to identify any conflict, let alone a conflict that would grant them standing to seek disqualification. The Health District points out that the Rules of Professional Conduct provide a procedure for dealing with potential conflicts that may arise in such a situation, i.e., by providing notice to the clients of the potential for conflicts and allowing clients to waive those conflicts if and when they arise. Holme Roberts & Owen claims that it has complied with Rule 1.7's conflict procedure. Thus, Defendants argue that they are free to defend themselves against Plaintiffs' claims in a manner they see fit.

The court agrees with Defendants that Plaintiffs have not identified any conflict that warrants disqualification. Thus, Plaintiffs' motion is denied.[1]

---

1. In addition, although Plaintiffs have argued that this case involves criminal wrongdoing and that this court should order the U.S. Attorney to convene a grand jury, this is a civil case, not a criminal case. If Plaintiffs believe that there has been criminal activity, they are free to contact the United States Attorney for the District of Utah. The court will not, as Plaintiffs request in their Complaint (*see, e.g.*, Complaint at 4), issue a Writ of Mandamus to the U.S. Attorney's office, the Department of Justice, the Government Accounting Office, and the IRS to investigate charges of facts contained in the Complaint and to select a grand jury. Consequently, the court dismisses any claims based on criminal law and any claims for Writs of Mandamus regarding criminal allegations.

Appendix A

V. DOUG SHORT'S REQUEST TO REPRESENT MARK MARYBOY

The County and Health District Defendants have objected to Mr. Short's representation of Mr. Maryboy on the basis that Mr. Short represented Plaintiffs in the previous litigation against these Defendants in the Tribal Court and that, in representing Mr. Maryboy in this action, there is an impermissible conflict that cannot be waived.

Mr. Short disagrees, arguing that Mr. Maryboy is entitled to select counsel of his choice. Mr. Short also represents that his previous clients (the three plaintiffs in the Tribal Court action) have waived any conflict. He claims that Rule 1.7 of the Rules of Professional Conduct do not come into play because that rule applies only to conflicts between current clients, and Mr. Short is not currently representing Plaintiffs in this action.

The court agrees with Mr. Short that he may represent Mr. Maryboy. In addition, Mr. Short has also requested that the court order the County to pay Mr. Short for his defense of Mr. Maryboy. However, on the record before the court, the court cannot rule on that request at this time.

VI. CONCLUSION

For the foregoing reasons and good cause appearing, it is hereby ORDERED that:

(1) Plaintiffs' Motion for Rule 54(b) Certification As to the October 30 and December 13 Orders is GRANTED. However, the court emphasizes that the only claim being certified is Plaintiffs' claim for declaratory judgment that the Tribal Court Orders are enforceable against Defendants.[2] The issues raised by that claim are the issues addressed in the October 30 and December 13 Orders, which are (1) whether the County Defendants and Health District Defendants were immune from suit in the Navajo Tribal Court; and (2) whether the Tribal Court Orders are enforceable against Truck and Mr. Ickes. The remainder of the case is not stayed. A briefing schedule on pending motions is set forth above.

(2) Defendant R. Dennis Ickes' Motion to Dismiss is GRANTED, and Mr. Ickes is hereby dismissed from the case.

(3) Truck Insurance is hereby dismissed from the case, as there are no remaining claims against Truck.

---

2. While this claim is not specifically delineated as a claim for relief in Plaintiffs' Complaint, it is requested in various places. *See, e.g.*, Complaint at 2, 154. Specifically, in the Complaint, Plaintiffs request "a declaratory judgment that the Preliminary Injunction Order designed to protect the welfare of the Navajo Nation was issued within the sound discretion of the Navajo Nation District Court and is authoritative over the defendants and the political subdivisions."

(4) Defendants' Joint Motion for a Protective Order Regarding Mark Maryboy or in the Alternative to Disqualify Plaintiffs' Counsel is GRANTED in part and DENIED in part. The court will not disqualify Plaintiffs' counsel, but the following Protective Order applies to Ms. Schildmeyer:

(A) Ms. Schildmeyer is not allowed to represent Mr. Maryboy; (B) Ms. Schildmeyer is ordered not to communicate with Mr. Maryboy regarding this litigation, except through counsel and according to the specific procedures explained in the comment to Rule 4.2; (C) she is prohibited from communicating with Mr. Maryboy regarding anything other than policy matters, and she is prohibited from obtaining information or documents that he obtains through his position as a County Commissioner in connection with this lawsuit; (D) in the event Ms. Schildmeyer violates this order, she will be disqualified or otherwise sanctioned.

Ms. Schildmeyer is also required to provide to Defendants, via affidavit, an accounting of her contacts with Mark Maryboy, consistent with that described above, by March 21, 2001.

(5) Plaintiffs' Motion to Disqualify Defendants' Counsel is DENIED;

(6) Any criminal claims in the Complaint and any claims for Writs of Mandamus regarding criminal allegations are hereby DISMISSED.

Appendix A

(7) Doug Short's Request to Become Counsel for Mark Maryboy is GRANTED in part and DENIED in part. Mr. Short may serve as Mr. Maryboy's counsel, but this court cannot, at this point and on the record before the court, order the County to pay Mr. Short for Mr. Maryboy's defense.

DATED this 6th day of March, 2001.

BY THE COURT:

s/ Dale A. Kimball
DALE A. KIMBALL
United States District Judge

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING AND REHEARING EN BANC FILED NOVEMBER 8, 2002

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-4001

STEVEN MACARTHUR, et al.,

Plaintiffs - Appellants,

v.

SAN JUAN COUNTY, et al.,

Defendants - Appellees.

ORDER
Filed November 8, 2002

Before **EBEL**, **McKAY**, and **LUCERO**, Circuit Judges.

Appellants' petition for a panel rehearing and appellees' petition for rehearing en banc are denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Appendix B

Entered for the Court
PATRICK FISHER, Clerk of Court

by: s/ Steve Larson
Deputy Clerk

Supreme Court, U.S.
FILED
JUL 7 2003
OFFICE OF THE CLERK

No. 02-1774

In The
Supreme Court of the United States

In re FRED RIGGS, DONNA SINGER, and AL DICKSON,

Petitioners.

On Petition For Writs Of Mandamus And Prohibition To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF MANDAMUS AND PROHIBITION OF RESPONDENTS SAN JUAN HEALTH SERVICES DISTRICT, ROGER ATCITTY, KAREN ADAMS, PATSY SHUMWAY, JOHN LEWIS, REID WOOD AND LAUREN SCHAFER

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
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QUESTIONS PRESENTED FOR REVIEW

1. Whether an extraordinary writ of mandamus should issue to compel the court of appeals (i) to correct alleged errors in its decision in this matter and (ii) to enforce immediately certain Navajo tribal court orders against respondents, despite this Court's previous denial of petitioners' writ of certiorari raising the same errors and issues.

2. Whether an extraordinary writ should issue to prohibit the Health District and the Health District employees and board members sued either individually or in their official capacity from being represented by one law firm.

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioners Fred Riggs, Donna Singer and Al Dickson are plaintiffs below and plaintiffs in the action before the Navajo tribal court.

Respondents

Respondents San Juan Health Services District, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway (official capacity only), John Lewis and Lauren Schafer (collectively "respondents or Health District respondents") are defendants below and defendants in the action before the Navajo tribal court. Petitioners purport to substitute as defendants (albeit in their official capacities) several newly appointed members of the Health District Board of Trustees, including Nettie Prack, Grant Imel and Cleal Bradford. However, because these Health District officials are sued only in their official capacity, and official capacity suits are indistinguishable from a suit against the governmental entity, substitution of these parties is unnecessary. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Turner v. Houma Municipal Fire and Police Civil Service Board*, 229 F.3d 478, 483 (5th Cir. 2000).

Additional Parties in this Court

San Juan County, J. Tyron Lewis, Lyn Stevens (official capacity), Manuel Morgan (official capacity), Bill Redd, Rick Bailey, Craig Halls (collectively "San Juan County respondents"), Truck Insurance Exchange ("Truck Insurance") and Dennis Ickes are additional respondents, defendants below, and defendants in the action before the Navajo tribal court.

PARTIES TO THE PROCEEDINGS – Continued

Additional Parties Below

Dr. Steven MacArthur, Michele Lyman, Helen Valdez, Candace Laws, Paul Kieth, Dorothy Kieth, Baxter Benally, Percy Mitchell, Melvin Capitan, Candace Holiday, Percy Mitchell, Eva Pleasant, Amy Terlaak and Linda Cacapardo were additional plaintiffs in the district court below, but were not parties in the action before the Navajo tribal court.

Cleal Bradford, John Housekeeper, Gary Holliday, Dr. James Redd, Dr. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Laurie Wallace, Carla Grimshaw, Gloria Yanito and Julie Bronson were additional defendants in the district court below, but were not parties in the action before the Navajo tribal court.

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OPINIONS BELOW

The December 28, 1999 preliminary injunction entered by the District Court of the Navajo Nation, Judicial District of Shiprock, New Mexico, is reprinted in the appendix to the petition for writs of mandamus and prohibition ("P. App. [02-1774]") at 1a-32a. The Navajo tribal court entered three additional orders in furtherance of the December 28, 1999 preliminary injunction. These orders, dated March 1, 2000, March 2, 2000 and March 15, 2000, are reprinted in P. App. [02-1774] at 33a-57a. In the action below, petitioners sought enforcement of these orders entered by the Navajo tribal court.

The October 30, 2000 decision of the United States District Court for the District of Utah, Central Division, is unreported and is reprinted in P. App. [02-1774] at 169a-194a. The October 30, 2000 order dismissed petitioner's claim seeking enforcement of the tribal court orders with respect to the Health District and San Juan County respondents. The December 12, 2000 decision of the District Court is unreported and is reprinted in P. App. [02-1774] at 195a-211a. The December 12, 2000 order dismissed the claim seeking enforcement of the tribal court orders with respect to respondents Dennis Ickes and Truck Insurance.

The October 7, 2002 decision of the United States Court of Appeals for the Tenth Circuit is reported at 309 F.3d 1216, and is reprinted in P. App. [02-1774] at 121a-144a. On November 8, 2002, the court of appeals denied a petition for panel rehearing submitted by petitioners as well as a petition for rehearing en banc submitted by respondents. The Order denying the petitions is reprinted

in the appendix to the petition for writ of certiorari previously filed by petitioners ("P. App. [02-1253]") at 105a-106a. Petitioners also filed a petition for writ of mandamus in the court of appeals, asking the court to vacate and replace its October 7, 2002 decision and direct the district court to either recuse itself or follow different directions than those given in the October 7, 2002 decision. The court of appeals denied the petition for writ of mandamus. P. App. [02-1774] at 119a.

BASIS FOR JURISDICTION

This Court's jurisdiction to hear petitions for extraordinary relief is based on 28 U.S.C. § 1651(a) and Rule 20.1 of the Rules of the Supreme Court. In reliance on Rule 20.3, this Brief in Opposition to the petition for writs of mandamus and prohibition is filed within thirty days from June 5, 2003, the date on which the petition was placed on the docket.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, REGULATIONS AND ORDINANCES

The constitutional provisions, treaties, statutes, or other authorities identified by petitioners are not relevant to determination of whether a writ of mandamus or prohibition should issue. Rule 20 is relevant to the petition but is not reprinted here. The All Writs Act, 28 U.S.C. § 1651(a), is also relevant and provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their

respective jurisdictions and agreeable to the usages and principles of law."

STATEMENT OF THE CASE

The Health District is a special service district organized by respondent San Juan County pursuant to Utah Code Ann. § 17A-2-1204. The individual Health District respondents are employees of the Health District or members of its board of trustees. The individual San Juan County respondents are County officials or employees of San Juan County.

The Health District operates a hospital in Monticello, Utah, as well as several outpatient clinics. Prior to January 1, 2000, the Health District operated an outpatient clinic located in Montezuma Creek, Utah. The Montezuma Creek Clinic is located within the exterior boundary of the Navajo Reservation on fee land owned by the State of Utah as part of the Utah Navajo Trust Fund.[1] P. App. [02-1253] at 3a. The Health District provided medical services at the Clinic to Native Americans residing on the Navajo reservation pursuant to a contract with Indian Health Services, a federal government agency. Petitioners Fred Riggs, Donna Singer and Al Dickson were employed by the Health District at its Montezuma Creek Clinic. *Id.* In

[1] Petitioners state that the Clinic is on "Navajo Nation trust land," implying ownership of the land by the Navajo tribe. Petition at 16, n.31. In fact, the land on which the Clinic is located is owned by the State of Utah as part of the Utah Navajo Trust Fund, which the State of Utah administers. That the Trust Fund proceeds are used for the benefit of the Navajo people does not change the nature of that ownership.

approximately November 1998, the Health District terminated Singer's employment, while Riggs and Dickson remained employed by the Health District at the Montezuma Creek Clinic until January 1, 2000, when the Health District ceased operating the clinic.[2]

In April 1999, petitioners filed a Complaint for Damages in the Navajo tribal court. P. App. [02-1253] at 3a. While petitioners describe their tribal court Complaint as asserting Navajo law violations, Petition at 5, the Complaint in fact asserted a broad array of claims against the Health District and San Juan County respondents, including federal civil rights claims, state law tort claims and some Navajo law claims. P. App. [02-1253] at 4a, n.2. Riggs' and Dickson's claims arose generally out of their employment relationship with the Health District, while Singer's claims arose primarily from the Health District's termination of her employment.

Respondents asserted both sovereign immunity and lack of jurisdiction as defenses to the Navajo tribal court Complaint. P. App. [02-1253] at 30a. Nevertheless, on December 28, 1999, the Navajo tribal court issued a preliminary injunction in which it ordered the Health District to reinstate petitioner Singer to her previous position and awarded back pay and attorneys fees (an amount petitioners claimed was in excess of $500,000) to each of the petitioners. P. App. [02-1774] at 1a-32a.

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[2] Since January 1, 2000, the Montezuma Creek Clinic has been owned and operated by Utah Navajo Health Systems, Inc. ("UNHS"), an entity of which Singer is the executive director. Singer, Riggs and Dickson have all been employed by UNHS at the Montezuma Creek Clinic since January 1, 2000.

Despite the fact that the Health District owned and operated the Montezuma Creek Clinic, the preliminary injunction order also purported to preclude respondents from "interfering" with the management of the Clinic and directed respondents to take certain affirmative steps with respect to its operation of the Health District. *Id.* at 29a-37a. Moreover, although petitioners were the only named parties, the order provided broad relief to members of the Navajo Tribe in general, including prohibiting the Health District from billing Navajo Tribe members for health care services, regardless of whether the services were provided at the Montezuma Creek Clinic or at Health District facilities off the reservation. *Id.* at 31a.[3]

In March 2000, the tribal court entered several orders supplementing the preliminary injunction, including an Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order dated March 1, 2000, P. App. [02-1774] at 33a; the Special Order in Aid to Satisfaction of Preliminary Injunction dated March 2, 2000, *Id.* at 53a; and the Order Mandating that All Defendants' [sic] Be Bound by the Preliminary Injunction Order. *Id.* at 55a. Pursuant to these orders, the Navajo tribal court ordered respondents immediately to pay back wages and attorneys fees, *id.* at 48a-49a; imposed a $10,000 per day penalty upon respondents in the event they failed to comply

[3] Petitioners' assertion that the tribal court's preliminary injunction order became the judgment on the merits with respect to the claims addressed by the orders is misleading. Petition at 9. While the orders suggest that the preliminary injunction evidence provided by petitioners established part of their case in chief, the tribal court clearly contemplated further proceedings on petitioners' claims. P. App. [02-1774] at 41a-43a.

immediately with the Navajo tribal court's orders, $1,000 of which was to be paid by the individual respondents, *Id.* at 51a-52a; and ordered that the penalty would apply during any period of appeal.[4] *Id.* The tribal court also purported to grant petitioners leave to seek immediate enforcement of its orders in any Utah or federal court. *Id.* at 54a. Finally, the Navajo tribal court permitted petitioners to add as defendants Truck Insurance, the Health District's insurer, and Dennis Ickes, counsel for the Health District and San Juan County respondents in Navajo tribal court. The tribal court also bound both newly added defendants to its previously-entered orders. *Id.* at 55a-57a.[5]

In August 2000, petitioners filed this action in the United States District Court for the District of Utah seeking to enforce the tribal court orders.[6] Shortly after the institution of this action, respondents moved to

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[4] Petitioners state that an April 2003 "clarification" from the tribal court demonstrates that these fines are not "penal" in nature. The nature of the fines should be judged on the language of the order, not a self-serving "clarification" prepared and submitted by petitioners three years after the fact, particularly where petitioners did not serve respondents with the clarification until after the tribal court executed it.

[5] Petitioners assert that in the tribal court, respondents were given every opportunity to respond to petitioners' claims, and were afforded due process. Petition at 5-6. The Health District defendants dispute this assertion.

[6] In addition to the enforcement claim asserted by petitioners, the district court action named as plaintiffs a number of individuals other than petitioners. These additional plaintiffs asserted a broad range of federal civil rights and other claims against respondents as well as other defendants. The claims of these additional plaintiffs are not at issue before the Court.

dismiss petitioners' claims to enforce the Navajo tribal court orders based on respondents' sovereign immunity from suit in tribal court. By Order dated October 30, 2000, the district court dismissed petitioners' enforcement claim with respect to the Health District and San Juan County respondents. *Id.* at 169a. The district court held that, as political subdivisions of the State of Utah and their officials or employees, the Health District and San Juan County respondents shared in the State's sovereign immunity from suit in the Navajo tribal court. *Id.* at 184a. On December 13, 2000, the district court entered an order dismissing the enforcement claim as against Truck Insurance and Ickes on the grounds the tribal court lacked subject matter jurisdiction over them. *Id.* at 195a.

Thereafter, petitioners sought and obtained certification of the October 30 and December 13, 2000 orders pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. On appeal, the court of appeals reversed the district court's ruling with respect to the Health District and San Juan County respondents. *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002); P. App. [02-1774] at 121a. While the court of appeals acknowledged that cross-petitioners may have been entitled to sovereign immunity from suit in the Navajo tribal court, it found that the district court should have addressed the issue of the tribal court's subject matter jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981), prior to addressing cross-petitioners' claim of sovereign immunity. *Id.* at 1226; P. App. [02-1774] at 140a. The court of appeals remanded petitioners' claim against the Health District and San Juan County respondents to district court for a determination of the tribal court's subject matter jurisdiction. *Id.* at 1228; P. App. [02-1774] at 141a. The court of

appeals affirmed the district court's dismissal of petitioners' claim against Truck Insurance and Ickes, concluding that the Navajo tribal court lacked jurisdiction pursuant to *Montana*. *Id.* at 1223-24; P. App. [02-1774] at 136a-137a.

Petitioners filed a petition for panel rehearing of the court of appeals' decision, which was denied. Petitioners also filed a petition for writ of mandamus with the court of appeals, asking the court of appeals to order the district court to disregard the appellate court's remand instructions, and instead, to enforce the orders immediately. The court of appeals denied the petition, finding (i) it was in essence an untimely petition for rehearing, and (ii) petitioners had another adequate avenue of relief because they could appeal any adverse decision by the district court on remand.

Petitioners filed a petition for writ of certiorari in this Court in February 2003. Both the Health District and San Juan County respondents filed conditional cross-petitions for writs of certiorari. The petition for writ of certiorari and the cross-petitions were denied on June 2, 2003.

REASONS FOR DENYING THE PETITION

The petition for writs of mandamus and prohibition[7] must be denied because petitioners cannot demonstrate

[7] Mandamus and prohibition are both types of extraordinary writs that may be invoked to correct an unlawful assumption of jurisdiction by a lower court. The main difference is that a writ of mandamus is an affirmative remedy – it compels a court or other entity or person to do

(Continued on following page)

that they meet the requirements of Rule 20.1, which provides:

> Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.

Traditionally, the extraordinary writs have been used only to confine an inferior court to act within its jurisdiction or to compel it to exercise its jurisdiction according to its duty to do so. *Mallard v. United States District Court*, 490 U.S. 296, 308 (1989); *Will v. United States*, 389 U.S. 90, 95 (1967). Only exceptional circumstances amounting to a usurpation of judicial power will justify issuance of an extraordinary writ. *Id.* at 309; *Will*, 389 U.S. at 95. The petitioning party must also show that its right to the issuance of the writ is clear and indisputable. *Will*, 389 U.S. at 96. The petition must be denied because petitioners fail to satisfy any of the prerequisites to issuance of an extraordinary writ.

The petition also should be denied because petitioners have not identified the name and office or function of the persons against whom they seek relief, as required by Rule 20.3 of the Rules of the Supreme Court.

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something. A writ of prohibition is a negative remedy – it commands that something be left undone. 63C AM. JUR. 2D PROHIBITION § 6.

I. THE PETITION FOR WRIT OF MANDAMUS SHOULD BE DENIED BECAUSE IT DOES NOT MEET THE REQUIREMENTS OF RULE 20.1.

As noted above, prior to filing this petition, petitioners filed a petition for writ for certiorari, claiming error and seeking review of the court of appeals' decision. Apparently anticipating this Court's June 2, 2003 denial of the petition for writ of certiorari, on May 28, 2003, petitioners filed the petition for writs of mandamus and prohibition. This petition seeks the same relief and makes essentially the same arguments contained in the petition for writ of certiorari. In requesting certiorari, petitioners argued that the court of appeals erred in remanding for a subject matter jurisdiction analysis (followed by a sovereign immunity analysis if necessary). Instead, petitioners argued, the court of appeals should have found that the tribal court had subject matter jurisdiction and enforced the tribal court orders under principles of full faith and credit. Petition for Writ of Certiorari in No. 02-1253 at 19, 24-26.

In this petition, petitioners once again argue that the court of appeals erred and that the tribal court orders should be given full faith and credit and enforced because the tribal court had jurisdiction or authority over the non-Indian defendants for actions arising on the reservation, albeit on non-Indian owned land. In asserting that the tribal court had authority over the non-Indian defendants, petitioners make exactly the same arguments they made in the petition for writ of certiorari. For example, in both petitions, petitioners argue that the tribal court's authority is supported by, among other authorities, 25 U.S.C. §§ 450, 1301, 1302, 3601, 3602, 3651, Executive Order

13175, the BIA Navajo Judicial program contract, Senate Report No. 88, 103rd Cong., 1st Sess. 8 (1993); and the United Nations International Covenant on Civil and Political Rights. *Compare* Petition [02-1253] at 12-25 *with* Petition [02-1774] at 14-19. Petitioner's second attempt to obtain appellate review from this Court does not satisfy the requirements of Rule 20.1 and must be denied.

A. The Petition Is Not in Aid of This Court's Jurisdiction

As an initial matter, the petition must be denied because it is not in aid of this Court's jurisdiction. Although entitled "Petition for Writ[s] of Mandamus and Prohibition," the petition seeks the same relief as the petition for writ of certiorari – appellate review and reversal of the court of appeals' allegedly erroneous decision. The issuance of a writ is not proper in these circumstances. *See Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (stating that a writ of mandamus is not appropriate to address a simple showing of error); *see also State ex rel. Lambert v. King*, 538 S.E.2d 385, 388 (W.V. Ct. App. 2000) ("it is well established that a 'writ of prohibition will not issue to prevent a simple abuse of discretion by the trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers.'" (citation omitted)). The petition is a thinly veiled attempt to circumvent this Court's previous denial of appellate review in connection with the petition for writ of certiorari. Granting the petition would therefore frustrate, not aid, this Court's jurisdiction.

B. Petitioners Cannot Establish the Exceptional Circumstances Necessary to Allow Issuance of a Writ of Mandamus

As stated above, a writ of mandamus is appropriately issued only where a court has failed to act when it is its duty to do so, or to prevent a court from acting outside its jurisdiction. *Allied Chemical,* 449 U.S. at 35. Here, petitioners argue that the court of appeals erred by not enforcing the tribal court orders, and they seek mandamus because their attempt to obtain appellate review by way of a petition for writ of certiorari failed. Claims of legal error, as opposed to lack of jurisdiction, do not supply the type of exceptional circumstances necessary for issuance of a writ of mandamus. *Id.* Granting the petition for a writ of mandamus in this situation would create a "backdoor" appellate procedure for litigants who unsuccessfully seek review from this Court by way of a writ of certiorari. The petition should therefore be denied.

C. Petitioners Have Other Adequate Avenues For Relief

Rule 20.1 also requires that a party seeking issuance of an extraordinary writ have no other adequate means to attain the relief he desires. *See also Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 26 (1943). Here, petitioners had an adequate means to seek review of the court of appeals' decision – a petition for writ of certiorari. That the petition for writ of certiorari was unsuccessful does not provide a basis for granting a writ of mandamus.

In fact, petitioners have avenues for relief in addition to the petition for certiorari. Petitioners can and have sought rehearing of the denial of their petition for writ of

certiorari. Petitioners also have recourse in district court. Pursuant to the court of appeals' mandate, the issue of subject matter jurisdiction has now been briefed and argued to the district court, and the parties are awaiting a decision. If petitioners are unhappy with the district court's decision, they can appeal that decision. *See* Order Denying Petition for Mandamus dated Feb. 20, 2003 (10th Cir.), P. App. [02-1774] at 119a (indicating that petitioners' ability to appeal any adverse judgment by the district court constitutes "other adequate means" to attain the relief they desire). Petitioners' many alternate avenues for relief require that the petition be denied.

D. The Petition for Writ of Mandamus Must Be Denied Because the Tribal Court Orders Are Not Entitled to Full Faith and Credit

Even if petitioners had satisfied Rule 20.1, their petition for writ of mandamus fails on the merits. Petitioners' argument that the tribal court orders must be given full faith and credit and enforced because the tribal court had authority over the respondents' actions is unavailing. The Full Faith and Credit Clause provides that each state shall give "full faith and credit" to another state's public acts, records and judicial proceedings. U.S. Const. art. IV, § 1. Congress has implemented the Full Faith and Credit Clause at 28 U.S.C. § 1738, which provides that authenticated judicial proceedings of any state, territory or possession of the United States shall be given the same effect in every court within the United States and its states, territories or possessions that the proceedings had in the jurisdiction in which they were issued. The

tribal court's orders do not fall within this statute and are not entitled to full faith and credit in federal court.

Tribes are not considered territories or possessions of the United States for purposes of the Full Faith and Credit Clause, and tribal court proceedings are therefore not entitled to full faith and credit in federal court. *Wilson v. Marchington*, 127 F.3d 805, 809 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998) (holding that tribal court judgment is not entitled to full faith and credit and tribe is not a territory within the meaning of full faith and credit clause).[8] While petitions cite *Inyo County v. Paiute-Shoshone Indians*, 123 S. Ct. 1887 (2003), for the proposition that Indian nations are treated like states and territories for purposes of 28 U.S.C. § 1738, *Inyo* does not support that argument. In *Inyo*, this Court concluded that a tribe, as a sovereign, is not a "person" entitled to bring suit under 42 U.S.C. § 1983. *Id.* at 1894. Contrary to petitioners' assertion, petition at 17, the Court did not state that a tribe is a state or territory for purposes of § 1983, but only noted in passing that, like states, tribes could not sue under § 1983 by reason of their sovereignty. *Id.* at 1892. *Inyo* simply does not support petitioners' claim that tribal court orders are entitled to full faith and credit in the federal courts.[9] Petitioners have failed to

[8] In *United States ex rel. Mackey v. Coxe*, 59 U.S. 100, 103-04 (1855), the Court held that the Cherokee nation was a territory but only as that term was used in a federal letters of administration statute.

[9] Petitioners also rely on *Halwood v. Cowboy Auto Sales, Inc.*, 946 P.2d 1088 (N.M. App. 1997) in support of their argument that the tribal court orders should be enforced as a matter of full faith and credit. However, that New Mexico has decided to afford tribal court orders full faith and credit in its own courts does not establish such orders are

(Continued on following page)

demonstrate that the tribal court orders are entitled to full faith and credit.

II. THE PETITION FOR WRIT OF PROHIBITION MUST BE DENIED

A. A Writ of Prohibition Is Not the Appropriate Remedy

Although a writ of prohibition is similar to a writ of mandamus, a writ of prohibition commands that an act be left undone, while a writ of mandamus compels action. *See supra* n.7. Because a writ of prohibition is a negative remedy, it is not an appropriate remedy for acts that have already occurred. 63C AM. JUR. 2D PROHIBITION § 4. Here, petitioners seek the writ to correct the district court's alleged error in allowing the Health District and the individual Health District respondents to be represented by one law firm.[10] The remedy petitioners seek is affirmative, not negative. Their petition for a writ of prohibition must therefore be denied.

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given full faith and credit by federal courts. Moreover, *Halwood* states that New Mexico accords tribal court proceedings full faith and credit only if the tribal court had subject matter jurisdiction over the defendants. Here, neither the district court nor the court of appeals has ruled on the issue of subject matter jurisdiction, nor has it been briefed by respondents in this Court.

[10] The Petition implies that both the County and Health District respondents are represented by one law firm. In fact, as the pleadings in this action demonstrate, the County respondents and the Health District respondents are represented by separate counsel.

B. The Petition for a Writ of Prohibition Does Not Meet Rule 20.1's Requirements

Whether seeking a petition for writ of prohibition or mandamus, petitioners must demonstrate that the requirements of Rule 20.1 have been met. Petitioners cannot do so. First, petitioners cannot show that the writ they seek would further the jurisdiction of this Court. As set forth *infra* Section II.C, contrary to petitioners' arguments, respondents' representation arrangements are appropriate under the ethical rules. In addition, as with the requested writ of mandamus, petitioners inappropriately seek to correct alleged lower court error by a writ of prohibition, rather than pursuing their right to appeal. Thus, it would not further this Court's jurisdiction to issue an extraordinary writ.

Nor can petitioners demonstrate that exceptional circumstances justify the issuance of a writ. Petitioners' allegation that respondents' representation is inappropriate is based on speculation, assumption and outdated or inapplicable legal authority. *See infra* Section II.C. Petitioners must demonstrate that their right to the writ is clear and indisputable. Speculation and assumption do not meet this burden or create exceptional circumstances.

Finally, petitioners have another avenue for relief. If petitioners truly believe they have evidence of improper representation, petitioners can once again seek relief in the district court. Petitioners may also raise the issue on appeal, when district court proceedings conclude. As the Ohio Supreme Court has noted, "[p]rohibition will not lie to prevent an anticipated erroneous judgment." *State ex rel. Jones v. Suster*, 701 N.E.2d 1002, 1006 (Ohio 1998). Thus, the petition for writ of prohibition must be denied.

C. The Petition For Writ of Prohibition Lacks Substantive Merit

Even if petitioners could meet the requirements of Rule 20.1, which they cannot, their request for a writ of prohibition lacks substantive merit. Contrary to petitioners' arguments, the Health District respondents' representation is contemplated by and allowed under the Utah Rules of Professional Conduct. *See* Utah R. Prof. Cond. 1.7; 1.13. Rule 1.7 provides a procedure for dealing with potential conflicts, i.e., providing notice to the clients of the potential for conflicts and allowing the clients to waive those conflicts if and when they arise. *See* Rule 1.7(b). While petitioners assert that a conflict exists, they fail to point to any facts, as opposed to speculation and assumption, demonstrating a conflict. None of the individual Health District respondents have alleged liability on the part of or directed blame toward other respondents. Mere unsupported speculation does not provide a basis for relief.

The authorities on which petitioners rely in seeking the writ of prohibition are equally flawed. Petitioners argue that respondents' representation improperly precludes petitioners, and presumably their counsel on their behalf, from petitioning their elected representatives contrary to Utah State Bar Ethics Opinion 115. Petitioners' reliance on Opinion 115 is misplaced because it has been superceded by significant amendments to Rule 4.2. The amended version of Rule 4.2 prohibits much of the contact between a lawyer and represented governmental officials that was deemed acceptable in Opinion 115, based on the pre-amendment version of Rule 4.2. Moreover, the ability of petitioners and their counsel to communicate with the government officials and employees named as

parties in this action is governed by the ethical rules, not by respondents' choice of representation.

Petitioners also rely on Utah Ethics Opinion 98-06 and *Salt Lake County Comm'n v. Short*, 985 P.2d 899 (Utah 2000). However, both Opinion 98-06 and *Short* deal with the ethical obligations of a government attorney such as a district attorney. In this case, by contrast, private counsel has been retained by a special service district to represent it in connection with a particular matter. Petitioners have failed to demonstrate that the Health District's legal representation is wrongful in any way. The writ should be denied.

III. PETITIONERS' REQUEST FOR EXTRAORDINARY WRITS SHOULD BE DENIED BECAUSE THEY HAVE FAILED TO COMPLY WITH RULE 20.3

Rule 20.3 provides that a petition seeking a writ of mandamus or writ of prohibition must state the name and office or function of every person against whom relief is sought. Petitioners have failed to meet this requirement for extraordinary relief. It is simply unclear from the petition against whom petitioners seek relief. Their petition should therefore be denied.

IV. RESPONDENTS SHOULD BE AWARDED DAMAGES AND COSTS PURSUANT TO RULE 42.2.

The Health District respondents hereby request and move the Court for an award of damages and costs pursuant to Rule 42.2 of the Rules of the Supreme Court, which allows for such awards when a petition for a writ of

certiorari, an appeal, or an application for other relief is frivolous. As noted above, the petition for writ of mandamus simply repeats the arguments made in petitioners' earlier filed petition for writ of certiorari – the tribal court had jurisdiction or authority to hear petitioners' claims against the respondents, and the lower courts should therefore have given the tribal court's orders full faith and credit and enforced them. This Court denied the petition for certiorari, and petitioners' attempt to circumvent that denial by filing a meritless petition for writs of mandamus and prohibition is frivolous and has caused respondents to incur significant costs. The costs were multiplied when petitioners sought to expedite consideration of the petition for writ of mandamus. Petitioners' actions are consistent with their prior conduct in this case, which includes filing numerous repetitive motions on the same subject, moving to recuse two federal district judges based solely on adverse rulings and filing motions challenging anticipated decisions without waiting for the actual decision.[11] *See, e.g.*, Order dated March 6, 2001, Case No. 2:00CV584K (D. Utah) (instructing petitioners to "refrain from filing additional memoranda on issues already briefed, (2) refrain from re-drafting and re-filing motions and memoranda, (3) temper their use of hyperbole and inflammatory language, and (4) cautioning petitioners that violation of the foregoing request will result in order requiring permission from the court for all future filings). As damages

[11] The petition for writs of mandamus and prohibition is an example of this conduct. Petitioners filed this petition without waiting for the Court to issue its decision on the petition for writ of certiorari. Moreover, petitioners then filed a petition for rehearing on the petition for writ of certiorari notwithstanding this petition.

under Rule 42.2, respondents should be awarded their attorneys fees and expenses incurred in responding to the petition for writs of mandamus and prohibition and the motion to expedite.

CONCLUSION

As petitioners themselves acknowledge, this petition is an attempt to short-cut the litigation process and obtain a speedier resolution of this matter. Petition at 26. Petitioners fear an adverse result in the district court and do not want to suffer the "delay" of the normal appellate process in the event of an adverse decision. Petitioners therefore want this Court to address the ultimate issue in this case – enforcement of the tribal court orders – even though neither the district court nor the court of appeals has yet decided the issue of subject matter jurisdiction, or whether, even if the tribal court had subject matter jurisdiction, respondents were afforded due process in the tribal court. Petitioners should not be allowed to avoid ordinary procedural and appellate processes. *See Will*, 389 U.S. at 97 (stating that mandamus is not a substitute for appeal); *see also Suster*, 701 N.E.2d at 1009 ("The fact that postjudgment appeal may be time-consuming and expensive to pursue does not render appeal inadequate so as to justify extraordinary relief." (citation omitted)).

For the reasons stated above, petitioners cannot establish a right to relief. The petition should be denied and the Health District respondents should be awarded their fees and costs incurred in responding to the petition.

Respectfully submitted,

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In the

Supreme Court of the United States

IN RE: FRED RIGGS, DONNA SINGER and AL DICKSON

Petition for a Writ of Mandamus and Prohibition to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF TO RESPONDENT SAN JUAN HEALTH SERVICES DISTRICT'S BRIEF IN OPPOSITION

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NOW COMES THE PETITIONERS in reply to the San Juan Health Service District's respondents group brief in opposition to the Petitioners' Supreme Court rule 20 and 28 U.S.C. § 1651(a) and 28 U.S.C. § 1738 extraordinary writ of mandamus and writ of petition to enforce the Navajo Court orders under 28 U.S.C. § 1738's full faith and credit in this Court as follows:

PETITIONERS ARE BEING DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAWS OF THE UNITED STATES BASED UPON RACIAL ANIMUS

The Petitioners have gone through years of unnecessary, expensive, and delaying litigation in federal courts to obtain enforcement of Navajo orders, specifically on a racial and nationñal origin invidious discriminatory basis that presumes Navajo judges are incapable of distributing justice equally to mostly non-Indian respondents 1) who violate Navajo law within the reservation boundaries against persons injured while within Navajo boundaries, two of whom are Navajo citizens, and 2) who actively and voluntarily file non-compulsory counterclaims *seeking* the Navajo Court's protections. Undisputed by the Respondents. Neither do the respondents debate the factual findings of the Navajo Court, yet without the required *National Farmer's Union Ins. Co. et al v. Crow et al* 1985 U.S. LEXIS 27 *8-9, 471 U.S. 845 exhaustion of Navajo remedies, federal courts substituted themselves as new fact finders for NAVAJO law, overwhich federal courts lack all jurisdiction, to dismiss Truck and Attorney Ickes as parties. This mandamus enforcement order would require Truck and Attorney Ickes to abide by the Navajo law they broke and did not exhaust as a means to excuse themselves from the Navajo Orders. Truck and Attorney Ickes have not responded to this petition.

Petitioners are deprived of their day in Court

that they legitmately won.... *because their judge is Indian, the law they seek protections from is Indian, and the Federal Courts below, contrary to Congress, are refusing to treat Indian judgments equally with all other state, territorial or possession judgments over all people.* Invidious presumptions supplant Congressional findings and acts. Justice delayed is justice denied. *Arnett v. Kennedy*, 416 U.S. 134 (1974); 1974 U.S. LEXIS 125 *140. The harm is ongoing. [1] The respondents fail to rebut the Navajo Court factual findings that respondents were never denied due process in Navajo Court (Extra. Writ. App. 35a). *Undisputedly*, if these Navajo orders had been against all Indian respondents, this case would not be here now. The lack of federal enforcement for these Navajo orders in federal and 10th circuit courts demonstrates Navajo law and Congressional protections for Navajo law are worthless *unless* 28 U.S.C. § 1738 is enforced now.

28 U.S.C. § 1738 Aids This Court's Jurisdiction

Respondents fail to cite one authority that shows any prerequisites are required to be met prior to 28 U.S.C. 1738 full faith and credit enforcement of Indian territorial orders. § 1738 aids this Courts jurisdiction by making this Court enforce Navajo orders and by making this Court accessible to Indian Court parties, particularly in an emergency such as this is, promotes judicial economy by preventing years of appeals that equates to denial of due process.

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[1] Navajo patients are still believing they must pay for their publicly insured care because these respondents, who billed these non-English speaking Navajo patients, refuse to so much as publicly inform the patients that they can be seen without payment at Montezuma Creek Clinic, Utah. Extra. Writ App. 61a-69a, 145a-157a.

Respondents' Brief is Flawed Procedurally and Reads Like a Cross-Petition Rather than a Brief in Opposition

The Respondents can file a cross-petition, but failed to do so. The Supreme Court rule 15 allows for rewording of the question. Here, however, the Respondents reword the questions, and recolor facts by omissions, and fail to address squarely the legal questions of the Petitioners. Petitioners are forced to basically file a reply brief *and* brief in opposition to a *de facto* type cross-petition attacking the Navajo Nation Court Orders specifically because most of the respondents are non-Indian. Respondents fail to discuss point by point the law found in the cases they cite. The Petitioners have no way of knowing how to respond to case cites, and the Court is placed in the position of presuming the respondent's arguments. Such is not the foundation of due process and the respondents alleged arguments, should be disregarded as in violation of the rules and the Petitioners' petition should be granted.

Respondents Offer No Exclusions of this Court for § 1738 for enforcement of Congressionally-protected Navajo law

> " ....Such Acts, records and judicial proceedings [of states, territories or possessions] or copies thereof, so authenticated, *shall* have the same full faith and credit in **every** court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. "

28 U.S.C. Sec. 1738. Emphasis Added.[2]

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[2] (The complete trial record of the Navajo Court, oral and written, sealed and certified is in the basement of the U.S. District court central division of Utah case no. 00 cv 0584 MacArthur et al v. San Juan county et al and available to this Court upon request.)

Citing to Respondents' *Mallard v. United States District Court*, 490 U.S. 296, (1989);1989 U.S. LEXIS 2232 the § 1738 word 'shall' is obligatory on "EVERY" court by *Mallard*'s definitions. *12-14. *Mallard* supports the Petitioners.

Respondents Cite Cases, Some Off Point, and Offer Little or no Argumentation Leaving ThisCourt to Presume Arguments For the Respondents while Denying the Petitioners the Due Process Right of Specifically Rebutting Their Unidentifiable Arguments

Other Respondents' cases for denying mandamus do not apply to 28 U.S.C. § 1738 enforcement. See, *Will v. U. S.* 389 U.S. 90 (1967) (criminal case with no 1738 involvement involves Court's discretion, not statute mandamus); *Allied Chemical Corp v. Daiflon, Inc*, 449 U.S. 33 (1980) fn. 3 (cuts *for the Petitioners* in that neither the Appellate Court nor Federal Court had any authority or discretion to dismiss Truck and Ickes *particularly without looking at the trial record*,); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cer denied*, 523 U.S. 1074 (1998) (respondents fail to *discuss Marchington*, identify what reasoning and points of law apply nor why *Marchington* should apply to *Navajo* rulings); *Halwood v. Cowboy Auto Sales, Inc.* 946 P.2d 1088 (N.M. App. 1997) (respondents fail to show this Court that this Court *denied cert* for *Halwood*, docket no. 98-858, Feb. 22, 1999, after *Marchington*, nor explain why New Mexico's reasoning on giving full faith and credit to Navajo orders should not apply to federal courts or this court under § 1738, or why *Halwood*'s reasoning is somehow defective for use in Federal courts over *Marchington*); *State ex rel Lambert v. King*, 538 S.E. 385, 388 (W.V. Ct. App. 2000) (respondents seek to use West Virginia case and statutory law, here, for Indian law and federal statutory mandates upon the Court. However, even under *King*,

if a Court is materially in error in law or involves subject matter jurisdiction, *King* supports the writ and petitioners view). Overall, the lack of specific argumentation (unlike the Petitioners' brief) deprives Petitioners of the due process to be able to respond and places the Court in the position of being the Respondents' advocate.

Respondents (1)fail to address Petitioners' arguments for Article I and II powers superceding this Court's Article III authority to define Indian Court jurisdiction (Pet. Brief. 23-25, 24); (2) fail to address that Indian law is superior in authority to state law (id and 19); (3) fail to address the statements of the federal district judge appearing to be biased (pet. brief 25) precluding fair enforcement below; (4)fail to address failure of the respondents to exhaust their Navajo remedies before being given any relief (Pet. Brief fn. 53); (5) fail to address that this Supreme Court defined Indian territory as one of the territories (Pet. Brief 21); (6) fail to address this Court's proclamation that municpalities are like any other natural person in *Cook County v. U. S. ex rel Chandler* 538 U.S. _____, slip opinion, March 10, 2003 docket no. 01-1572, (pet. brief 17-18) and *Jinks v. Richland County, South Carolina*, 538 U.S. _____ (April 22, 2003 slip opinion) Id. ; (7) fail to address the madates of international law for U.S. Indian Courts to equally apply justice to every one, without distinguishment based upon race or national origin (pet. brief pg. 14) ; and (8) fail to address the clearly stated intent of the Senate that Indian Courts are to be the Courts of presumption for Indian and non-Indian individuals (Pet. Brief 14.); (9) fail to address validity of the Navajo law as cited. Petitioners assert these arguments have all been conceded by the defendant district and district employees and officials individually, if the brief was

filed with District approval. [3]

Respondents Mistate Motives of the Petitioners

The splits between this Court's rulings and Congress' statutes, stare decisis prior to 1978, and numerous circuit courts rulings after *Nevada v. Hicks*, 2001 U.S. LEXIS 4669, 533 U.S. 353 (2001) disagreeing with *Hicks*, are ample grounds for hearing the appeal of a Indian subject matter case, such as has not been rejected in the last five years. However, the fact that the Petitioners' petition for certiorari 02-1253 was filed, and a petition for rehearing is filed, has no effect upon the 28 U.S.C. § 1738 requirements upon 'every' court for enforcement of the Navajo territorial orders. Respondents cite to none.

Another mistatement is "Petitioners.... *imply[ ]* ownership of the land [Montezuma Creek Clinic] by the Navajo Tribe." resp. brief. pg. 3 fn. 1. Petitioners *implied* nothing. The Respondents fail to contradict the FACTS that the money that the State - by Congressional *mandate*- holds in trust for Navajo welfare, comes from Navajo royalties, on Navajo land, from non-renewable recourses, for the sole use of Navajo enrolled members surrounding the clinic and land. Respondents do not debate the Petitioners position that Congress considers the land within Navajo jurisdiction because it is on land within Navajo borders under 18 U.S.C. § 1151.

Another misleading statement is Petitioners raised 'federal' civil rights claims in their complaint. Navajo law is unquestionably protected by Federal and

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[3] Congress was color blind when 28 U.S.C. § 1738 was passed and later interpreted in *United States ex rel. Mackey v. Coxe*, 59 U.S. 100 (1855);1855 U.S. LEXIS 670 *7-9 as applying to the Cherokee nation. In fact, respondents fail to recognize the most pertainent part of *Coxe's reasons* for granting full faith and credit to Cherokee orders, that the validity of the Cherokee's representative legislation are protected by Congress. LEXIS *7-9 applies to Navajo laws validity.

International law, as properly stated in the Navajo complaint. The Relief *sought here*, is purely Navajo law/Indian civil rights relief within the Navajo Court's ***exclusive*** jurisdiction. Respondents do not debate this. ***Respondents never debate*** *they ACTIVELY, VOLUNTARILY sought Navajo Court relief for their own common Navajo law fraud/theft claims.* See Extraordinary Writ (EW) App. 45a.

Lack of Jurisdiction to Grant Respondents' relief

Respondents could have filed a cross-petition and failed to do so. Without a cross-petition, this Court will not alter an order or deny relief to the Petitioners.[4] See , *Freytag v. Commissioner*, 501 U.S. 868, 894-895 (1991)(J. Scalia concurrence)(subject matter jurisdiction can be raised at any time, even sua sponte, even for the first time on appeal).

CONCLUSION

Based upon the foregoing, 28 U.S.C § 1738 and Congress have established no restrictions on § 1738

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[4] "Absent a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record, although his argument may involve an attack [*12] upon the reasoning of the lower court," but **may not** "alter the decree with a view either to enlarging his own rights thereunder or of **lessening the rights of his adversary**." United States v. American Railway Express Co., 265 U.S. 425, 435, 68 L. Ed. 1087, 44 S. Ct. 560 (1924); see also Union Tool Co. v. Wilson, 259 U.S. 107, 111, 66 L. Ed. 848, 42 S. Ct. 427 (1922). We recognized the latter limitation as early as 1796, see McDonough v. Dannery, 3 Dall. 188, 198, and more than 60 years ago we spoke of it as **"inveterate and certain,"** Morley Constr. Co. v. Maryland Casualty Co., 300 U.S. 185, 191, 81 L. Ed. 593, 57 S. Ct. 325 (1937)."

El Paso Natural Gas v. Neztsosie, 1999 U.S. LEXIS 3004,*11-12; 526 U.S. 473 Emphasis added.

Here, the defendants by rewording their issue statements seek to lessen the Indian law rights of the Petitioners in violation of Congressional mandates. As such, full faith and credit enforcement of the orders under § 1738 is entirely appropriate.

enforcement of orders by 'every' court, including this Court, nor provided any exceptions for this Court enforcing the orders under § 1738 for Indian Territorial Courts. Respondents show none either. Equality before the law dictates that a Writ of Mandamus enforcing the Navajo orders against the Respondents should issue without further delay.

A WRIT OF PROHIBITION IS APPROPIATE TO STOP ONGOING HARMS

Undisputedly, Petitioners' Petition is to stop ongoing harms. Extra. Writ. 58a-60a, 61a- 69a,145a-147a. Petitioners argue that under Utah law a municipal or quasi-municipal or County organization exists for the sole purpose of protecting the citizens and "achieving the ends of justice, an ultimate obligation that outweighs its narrower interest in prevailing in a lawsuit". *Frey v. Dept. of Health & Human Services*, 106 F.R.D. 32, 37 (E.D.N.Y. 1985) Utah Bar Ethics opinion 115.
http://www.utahbar.org/opinjions/html/115.html. Indeed, this Court has noted that States have no authority to authorize officials to violate the law and the official is personally responsible. *See*, *Ex Parte Young*, 1908 U.S. LEXIS 1726, *66-67; 209 U.S. 123.

Under the Rules of Professional Conduct there is no way one attorney can represent the government entity AND the proven wrongdoers that the entity has claims against and should be investigating and prosecuting. *Salt Lake County Comm'n v. Short*, 985 P.2d 899, par. 34 (Utah 2000) and Utah Bar Ethics Opinion 98-06 apply to ALL attorneys representing these entities. Respondents don't deny the Utah Supreme Court makes a clear distinction between a government organization's needs and the officials needs that, as here, are fully inherently conflicting. The Navajo facts are undebated. This means that the

organization with liabilities due to the wrongful official's/employee actions, has claims directly against the officials, minimally in their personal capacities. Utah Bar Ethics opinion 98-06.http://www.utahorg/opinions/html/98-6.html.

Such is an inherent and insurmountable conflict for which the entity *is entitled* to separate counsel and a voice in the litigation that this Court can order. Id. See, Utah Code § 17-53-227.

The Respondents fail to cite with any specific comments to Utah Rules of Professional Conduct rule 4.2[5] upon which they rely, *so again*, Petitioners can not respond and the Court is left to do the argumentation for the respondents. Respondants fail to cite any language that overturns Utah Bar Ethics opinions 98-06, 115, 115r. None exists.

The District's alleged counsel is bound to do 'minimal research' prior to signing a pleading. *See, Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.* 1991 U.S. LEXIS 1297,*16-17;498 U.S. 533

> "The signature of an attorney or party constitutes a certificate by the signer that . . . to the best of the signer's knowledge, information, and belief formed *after reasonable inquiry* it is well grounded in fact . . . If a pleading, motion, or other paper is signed in violation of this rule, the court . . . shall impose upon the person who signed it . . . an appropriate sanction" (emphasis added).

Id. Emphasis Added.

Here, no such research at least since January 1, 2003 has been done. Under the 'unified defense' there

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[5] In fact, the language of rule 4.2 comments references the statutorily and Constitutionally protected interests language referenced in Opinions 115 and 115r.

can be (1) no 'reasonable investigation' if the wrongdoing officials usurp the entities' ability to control its own litigation under a 'unified defense'; (2) no candor to the tribunal or to the entity client or to the opposing parties; (3) voters are disenfrancished by attorneys who refuse to seek the authority and approval of elected officials and those they appoint; (4) settlement becomes impossible with the entity who is silenced by the wrongdoers; and (5) the administration of justice becomes a sham against the petitioners who can not enjoy the due process and equal protection right of petitioning and seeking redress of their wrongs from the Courts or government entiies obliged to 'achieve the ends of justice' separate from the wrongdoers. Silence and deception and lack of participation of the most controlling respondent, the organization, should not be supported or tolerated here any more than in *Business Guides*.

CONCLUSION

Based upon the foregoing, the Writ of Prohibition should issue to stop ongoing harms to petitioners' due process and equal protections and the administration of justice, contrary to fairness and equality found in *Business Guides, supra* that this Court has consistently upheld.

Respectfully Submitted,

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Supreme Court, U.S.
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No. 02-1774

In the

Supreme Court of the United States

IN RE: FRED RIGGS, DONNA SINGER and AL DICKSON

ON PETITION FOR WRIT OF MANDAMUS AND PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY TO RESPONDENTS OF SAN JUAN COUNTY'S BRIEF IN OPPOSITION

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NOW COMES THE PETITIONERS in reply to the San Juan Health Service District's respondents group brief in opposition to the Petitioners' Supreme Court rule 20 and 28 U.S.C. 1651(a) and 28 U.S.C. sec. 1738 extraordinary writ of mandamus and writ of petition to enforce four Navajo Court orders under 28 U.S.C. sec. 1738's full faith and credit in this Court as follows:

Statement

Respondents do not dispute;

(1) the *land where the acts initially occurred* were initially on Utah Navajo trust land within the Aneth extension surrounded by Navajo communities, controlled by Utah under Congressional mandate in a private purpose trust *paid for with Navajo royalties from Navajo non-renewable resources as defined by Congress* in 18 U.S.C. 1151, Utah Code 63-88-102 et seq. and Act of June 14, 1934, ch. 521, 48 Stat. 960-962 [bad faith litigation and patient billing was on Navajo reservation trust land];

(2) Navajo Court counter-claiming respondents *actively sought* Navajo court relief for false non-compulsory counterclaims of fraud, theft, etc. against Petitioner Singer waiving any immunity by presenting live witnesses and evidence and participating in the litigation fully (*Sutton v. Utah School of the Deaf and Blind* 1999 U.S. App. LEXIS 3159,*19- 20 ;173 F.3d 1226 (1999));

(3) the Navajo Court counter-claiming repondents, and Truck and Attorney Ickes, *failed to exhaust their required Navajo remedies* or do a *National Farmer Union Ins. Co. v. Crow*, 1985 LEXIS 27, 471 U.S. 845, 855-856 (1985) analysis, in Navajo Court, prior federal court relief;

(4) and the Navajo Court counter-claiming respondents never *affirmatively* sought relief by motion or cross-

petition in the federal courts below. [1]
Respondents here raise no claims of lack of due process, bad faith or harassment claims that warrants giving them any equitable relief from the Navajo Court orders. The Respondents (including Truck and Attorney Ickes) failed to file a cross-petition for relief from these orders and this petition. With no cross-petition, this Court has said it will not deny relief to the Navajo Court Petitioners. [2] Respondents cite no law repealing 1738's coverage from this Court or *why* it is inappropriate for this Court to issue the Writ when the lower Courts are ignoring or denying it. Extra. Writ. 119a.

3 years of delay and appeal are a denial of due process

Justice delayed is justice denied. *Arnett v. Kennedy*, 416 U.S. 134 (1974); 1974 U.S. LEXIS 125 *140. If this petition is not granted, it is because Petitioners Riggs, Dickson are Indian, (Singer is wife and mother of Indians), their laws are Indian, and their U.S. Navajo

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[1] (See, *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1, 111 S.Ct. 2546, 2557 n. 1, (1991)(the clear expression rule "does not apply if the petitioner failed to exhaust state [here Navajo and Federal] remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.")

[2] "Absent a cross-appeal, an appellee may "urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court," but **may not** "alter the decree with a view either to enlarging his own rights thereunder or of **lessening the rights of his adversary**." [citations ommitted] and more than 60 years ago we spoke of it as **"inveterate and certain,"** Morley Constr. Co. v. Maryland Casualty Co., 300 U.S. 185, 191, 81 L. Ed. 593, 57 S. Ct. 325 (1937)."
El Paso Natural Gas v. Neztsosie, 1999 U.S. LEXIS 3004,*11-12; 526 U.S. 473 Emphasis added.
As such, full faith and credit enforcement of the orders under sec. 1738 is entirely appropriate specifically for Navajo law and Indian Civil Rights Act relief from Courts with exclusive jurisdiction. 25 U.S.C. 1303.

Nation judge, presumed by this court to be unable to distribute justice fairly to non-Indians, is Indian. [3]

RESPONDENTS' BRIEF IS FLAWED PROCEDURALLY AND READS LIKE A CROSS-PETITION SEEKING RELIEF FROM NAVAJO ORDERS RATHER THAN A BRIEF IN OPPOSITION

Petitioners are denied due process by having to respond to a brief in opposition that reads like a cross-petition with (1) lack of specific argumentation (unlike the Petitioners' brief); (2) broad inaccurate generalizations; (3) new issues; (4) off point case law; and (5) ignoring Petitioners' arguments and case law (6) all designed to in some way subvert Congressional mandates on this Court. Such argumentation places this Court in the position of being the Respondents' advocate by presuming their arguments based upon their ambiguities.

No less than 7 frivolous arguments have been raised by the Respondents and are charted in APPENDIX A. [4] *Wilson v. Marchington*, 127 F.3d 805 (9th cir. 1997) *cert denied* April 28, 1999, a key case for the respondents, involving a traffic accident, is *but one example* of inapplicability here. [5] Respondents wholely

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[3] Significantly, here, the Petitioners had to overcome the Navajo Judge's presumptions in favor of the municipal-type organizations and officials that the Navajo Judge relied upon to lift the May 14, 1999 TRO before issuing orders after over 9 months of litigation.

[4] Petitioners attempted to list and address these new arguments within the 10 page limits, but they were so numerous, and because they were not in a cross-petition, to respond anyother way than charting the arguments/responses, was entirely impossible.

[5] *Marchington* did not involve 1) the three branch representative government of the Navajo Nation; 2) a municipality-type organization violating the Indian Civil Rights Act 25 U.S.C. 1301 et seq. that is under the exclusive jurisdiction of Indian Courts (*Santa Clara*, supra), (3) violating other Navajo legislation that is sheltered by Congressional enactments (Pet. brief 14-15); (4) bad faith litigation that further harmed Navajo Nation Bill of Rights

ignore *Halwood v. Cowboy Auto Sales*, 946 P.2d 1088(1997) *cert denied* Feb. 22, 1999 docket no. 98-858, *U.S. ex rel Mackey v. Coxe*, 59 U.S.S 100 (1856), *Standley v. Roberts*, 59 F. 836, 845 (CA 1894), and *S.R.I. v. Pollaca*, SC-CVV-86-96 (Navajo Nation 2000) and others in Petitioners brief fn.45 showing 1738's application here. Respondents had a duty to inform this Court of cases opposite *Marchington* and did not.

SUBJECT MATTER JURISDICTION IS RAISED BY BOTH PARTIES

Both Petitioners and the respondents, in opposition, are raising this Court's subject matter jurisdiction under 28 U.S.C. sec. 1738 in relation to Indian territories, and as such, even for the first time on appeal, this Court even *sua sponte* must address the question (See , *Freytag v. Commissioner*, 501 U.S. 868, 894-895 (1991)(J. Scalia concurrence). Neither do respondents state how seeking a writ of mandamus to carry out a statute's demand on the courts is an abuse of the writ or outside its jurisdiction. See, *McClesky v. Zant*, 1991 U.S. LEXIS 2218, 48 ;499 U.S. 467.[6] Respondents don't dispute judicial economy is

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protections, again within the exclusive jurisdiction of the Navajo Court; (5) non-Indian (except three) respondents who all, without exception, consenually sought the Navajo Court jurisdiction for non compulsory Navajo common law claims against Petitioner Singer; (6) respondents who never affirmatively sought and exhausted relief in Navajo and Federal courts below as counterclaimants [waiving subject matter and personal jurisdiction and immunity]; (7) Navajo orders duly issued by a Navajo Court carrying out a BIA-Navajo judicial program contract in a uniform and fair manner while exercising Navajo inherent soveriegnty. All these factors make *Marchington* inapplicable here.

[6] Especially, here, where Respondents do not dispute that Congress has exercised its Article I and Article IV plenary or absolute authority to make needful laws for U.S. territories and possessions, and has chosen to legislate to protect Indian Nation sovereignty in accord with Treaties by way of several statutes, Pet. Brief fn. 23,

fostered by taking the case now. [7] See, *Lambrix v. Singletary*, 1997 U.S. LEXIS 2802,*13;520 U.S. 518 (the "inquiry requires a detailed analysis of federal constitutional law" and "rather than prolong this litigation by a remand" the Supreme Court is justified take the petition).

Successive Petitions are appropriate here.

This petition and their response call into question this Court's subject matter jurisdiction, the scope of its abilities, serious civil and human rights and liberty interests under 28 U.S.C. sec. 1738, separate from the petition for certiorari 02-1253. All are appropriate grounds to allow successive petitions. See, generally, *Felker v. Turpin*, 1996 U.S. LEXIS 4264,*20-22;518 U.S. 651 (this Court's ability to review successive petitions must be repealed by Congress, repeals by implication are disfavored). No statute prevents this Court from carrying out sec. 1738, particularly here, since the 10th cir. rejected the petitioners' petition for sec. 1738 relief. Pet. brief 119a.

Undisputedly, Federal Courts Below Acted Outside their Jurisdiction

Respondents don't deny the Federal Courts below illegally became new fact finders in dismissing

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26, 27, 28, 29, and ratify International law binding upon U.S. Indian Nations. Pet. Brief 25. Indian Nation law is not subordinate to states and certainly not counties, *MacArthur et al v. San Juan County et al*, 2002 U.S. App. LEXIS 20987, 309 F.3d 1216 (10th cir. 2002).

[7] For splits in the circuits as to the origin of Indian Nation Court authority, and federal court subject matter jurisdiction in Indian cases, *See, U. S. v. Enas*, 9th Cir. 2001 U.S. App. LEXIS 14397, *46 ; *U.S. v. Billie Joe Lara*, 8th Cir. 2003 U.S. App. LEXIS 5685,*11-12;324 F.3d 635; and *U. S. v. Frank Long*, 2003 U.S. App. LEXIS 5492,*23;324 F.3d 475. The very reason this Court should take this petition.

Truck and Attorney Ickes for *Navajo* claims and Indian Civil Rights Claims outside federal court authority over *Navajo* law. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 fn. 19-21 (1978) and 25 U.S.C. 1303. Enforcing the orders will undo this harm. *Santa Clara Pueblo, supra*, and 25 U.S.C. sec. 1303. ALLEGED 'exhaustion' occurred when *respondents* failed to seek further Navajo Court relief in Navajo Courts. Pet. brief fn. 53.

Respondents' cases for denying mandamus do not apply to the doctrines of finality fostered under 28 U.S.C. sec. 1738 enforcement.[8] *See, Camiolo et al v. State Farm Fire and Cas., Co. et al*, 2003 U.S. App. LEXIS 13258 *23 (3rd Cir. Court)(Courts are obliged to uphold legislation not in conflict with the Constitition). Here respondents never argue the Navajo law they broke is legislation that conflicts with the U.S Constitution.

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[8] See, *Will v. U. S.* 389 U.S. 90 (1967) (criminal case with no sec. 1738 involvement involves Court's discretion, not statute demand as with sec. 1738); *Allied Chemical Corp v. Daiflon, Inc*, 449 U.S. 33 (1980) fn. 3 (cuts *for the Petitioners* in that neither the Appellate Court nor Federal Court had any authority or discretion to dismiss Truck and Ickes or parties *particularly without looking at the trial record*,); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cer denied*, 523 U.S. 1074 (1998) (respondents fail to *discuss Marchington*'s assessment of Indian Nations or identify what reasoning and points of law apply nor why *Marchington* should apply to *Navajo* rulings when it dealt with another Indian Nation); *State ex rel Lambert v. King*, 538 S.E. 385, 388 (W.V. Ct. App. 2000) (respondents seek to use West Virginia case and statutory law, here, for Indian law and federal statutory mandates upon the Court. However, even under *King*, if a Court is materially in error in law (such as the federal courts below) or sub ject matter jurisdiction, *King* supports the writ and petitioners view).

PETITIONERS' NAVAJO LAW CLAIMS ARE EXHAUSTED

28 U.S.C. sec. 1738 full faith and credit enforcement is all that remains within the subject matter jurisdiction of the Federal Courts over Indian law claims and relief. Federal Court can only give habeus corpus relief under 28 U.S.C. 1303 for Indian Civil Rights Act violations, and are not designated by Congress as an appeal Court for Navajo claims. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 51 fn. 19-21 (1978). *Camiolo, supra. Never disputed by any respondents.*

CONCLUSION

Equality before the law, Congress' and Navajo law, dictates that a Writ of Mandamus enforcing the Navajo orders against the Respondents under 28 U.S.C. 1738 should issue without further delay.

A WRIT OF PROHIBITION IS APPROPIATE TO STOP ONGOING HARMS

A 'unified defense gags the organizations' voice before the court without troubling the Court for a gag or protective order for the entity that can investigate/prosecute wrongdoers, control settlements, effectuate discovery, and so forth. Petitioners seek to prohibit the use of a 'unified defense', wherein the organization and other newly elected officials, having by LAW, claims against the wrongdoer officials, all have the same attorney or law firm.

The 'unified defense's, ongoing harm, is *against* Utah and United States public policy, and Petitioners welfare , as follows: (1) the *Utah and Federal Constitutions that guarantee petitioners' access to and communication with the entities* and the officials[9] for

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[9] "Congress shall make no law respecting . . . the right of the people peaceably to assemble, and to petition the Government for a

the purpose of redress of wrongs and to foster sound public policy, albeit in a Court of law. See Utah Bar Ethics Opinions 115 and 115r for a discussion of these RIGHTS of the petitioners in Utah[10] ; (2) the Utah Supreme Court decision in *Salt Lake County v. Short*, 1999 UT 73, par. 33-35, [pet. brief page 27], *mandates separate representation of Counties separate from the wrongdoers* (a decision wholly ignored and conceded by the respondents); (3) Utah Bar Ethics opinion 98-06 [11] that applies to all attorneys representing such government organizations, commissions of officials, and the wrongdoers [pet. brief 29] (an ethics opinion ignored by the respondents *requiring the entity have separte counsel when the County Attorney or wrongdoing officials are parties* the County organization may investigate and prosecute) and (4) FRCP rule 11[12] and Rules of Professional Conduct 3.3 and 3.4 candor to the tribunal and parties. *Violations of Public Policy also presume to injure the Court, the petitioners, and respondent newly elected officials* who gave no prior approval for their representation, who are charged with a fine for not carrying out the Navajo orders due to the wrongdoers' acts. RESPONDENTS DON'T DENY THEY NEVER OBTAINED THE NEWLY ELECTED COUNTY OFFICIALS' APPROVAL PRIOR TO SIGNING THE DOCUMENTS IN THIS COURT, AND

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redress of grievances." U. S. Const. amend. I. "All men have the inherent and inalienable right . . . to assemble peaceably, protest against wrongs, and petition for redress of grievances." Utah Const. art. I, § 1.

Utah Ethics Opinion 115 fn. 1.

[10] htttp://www.utahbar.org/opinions/html/115.html

htttp://www.utahbar.org/opinions/html/115r.html

[11] http://www.utahbar.org/opinions/html/98-6.html

[12] See *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 1991 U.S. LEXIS 1297,*13-14;498 U.S. 533 ("Rule 11 is "aimed at curbing abuses of the judicial system.").

THE PUBLIC RECORDS SHOWS THEY DID NOT. Two-thirds of the public in San Juan County are disenfranchised in this litigation when 2 newly elected officials are not consulted prior to filings.

Appeals are no Substitute for Meaningful Hearing

An Appeal of an erroneous decision that can be avoided by candor to the tribunal now is a waste of judicial and parties' resources.... not a problem for Insurance funded and controlled litigation. To force petitioners because they are Indians to go through more expensive appeals in the face of bad faith litigation in the federal courts AND IN THIS COURT violates due process and equal protection rights that are entitlements of the Petitioners. Utah ethics opinions 115 and 115r fn. 10 *infra.*

Petitioners' Rights to Seek Redress Have Been Annhialated and They Have Standing

Petitioners' petition for certiorari was denied due to this Court's reliance on the erroneous belief that the documents before it were approved and based upon minimal research by the organizations prior to signing. Petitioners and THIS COURT have a right to know the true current litigation position of the Utah County and District *organizations, separate from the wrongdoers holding the organization's litigation hostage.* The organizations are charged with and exist for the purpose of 'achieving the ends of justice" *Frey v. Dept. of Health & Human Services*, 106 F.R.D. 32,37 (EDNY 1985). fn.11, *supra.* [13] Such minimal research PRIOR to signing a document requires minimal contact and discussion of the case with clients the attorney alleges to represent. *Business Guides, LEXIS *26, 43 supra.* Respondents ignore these legal sources, thus conceding

[13] *Arnett v. Kennedy*, 416 U.S. 134 (1974); 1974 U.S. LEXIS 125 *140.

them.

Respondents show Commissioner Maryboy, a Navajo member, was entitled to have separate representation of his choice. Resp. brief pg. 11a. What respondents fail to state is that Mr. Maryboy's, 'alleged' attorney from Suitter & Axeland sought a gag order on their 'own' client in the wrongdoers' behalf, prior to resigning from representing Mr. Maryboy. Mr. Maryboy wished to speak to the Court about the harms to the Navajo people in San Juan County and patterns of practice by the wrongdoers. APPENDIX B[14] Pet. brief 158a. Navajo Court has not dismissed Mr. Maryboy since leaving office, presumably due to a stay of proceedings in Navajo Court while this Court reviews these issues.

CONCLUSION

Based upon the foregoing, the petition for a writ of prohibition should be granted.

Respectfully submitted,

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Attorney for Petitioners

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Navajo Court Counsel
For the Petitioners
Assisting on the briefs

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[14] Mr. Maryboy could not afford or obtain counsel for 4 months during which the Federal Court was denied his salient contribution as to how San Juan County Navajo court wrongdoers had a systematic way of dealing with those persons challenging them by ruining their reputations, seeking to destroy them professionally, economically and socially, had a pattern of discriminating against Commissioner Maryboy and other Indian citizens, and was harming the Navajo people by privately billing them for publicly insured health services. See APPENDIX B pgs. 17a-18a, 24a-26a attached. Important information to which the Court and Petitioners were entitled.

APPENDIX CHART A
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APPENDIX CHART A

SEVEN RESPONDENTS' ARGUMENTS THAT ARE FRIVOLOUS AND WHOLLY WITHOUT MERIT

Inacccurate Argument (1): Not Mandatory on Federal Courts

The statute 28 U.S.C. § 1738 is not mandatory and states Congress can choose to extend full faith and credit to Indian Nation judgments. (Resp. brief page 15 and referencing a discretionary writ on pg. 10).

Accurate Response (1): Is Mandatory on Federal Courts

The word 'shall' for 'every' court (Resp. brief page 15) is obligatory. *Mallard v. United States District Court*, 490 U.S. 296, (1989);1989 U.S. LEXIS 2232 *12-14. Respondents say nothing and concede Petitioners cite to the Utah Enabling Act that states Utah 'forever disclaims all right and title... to all lands lying within said limits owned or held by any Inian or Indian tribes"... and Utah code 9-9-208, 209 giving full effect to Indian law not in violation of Utah law. (Pet. Brief page 17,20). Respondents cite to no case law showing how 'shall' is not an obligatory term.

Inaccurate Argument (2):

§ 1738 outside the federal judiciary's subject matter jurisdiction

28 U.S.C. 1738 full faith and credit extension to Navajo orders is "not within the power of the federal judiciary". (Resp. Brief 15 par.2).

Accurate Response (2):

Congress Mandates Federal Courts Apply Full Faith and Credit

"Absent a partial repeal of the Full Faith and Credit Act, 28 U.S.C. § 1738, by another federal statute, a federal court must give the judgment the same effect that it would have in the courts of the State in which it was rendered." *Matsushita Electric Industrial Co, Ltd., et al v. Epstein, et al*, 1996 U.S. LEXIS 1550,*6-7; 516 U.S. 367. Emphasis added. Respondents cite no case law in support of the federal judiciary being forbidden enforcement authority under § 1738.

Inaccurate Argument (3):

§ 1738 applies "only to states" (Resp. brief pg. 13).

Accurate Response (3) : § 1738 applies to 'Every Court'

Respondents entirely ignore, and thus concede, Petitioners' fn. 45 and *stare decisis*, *Atchison, T. & S.F. ry. v. Sowers*, 213 U. S. 55, 65 (1909)("The provision in the Constitution making it the duty of courts in one State to give full faith and credit to the decrees and legislative acts of other States is mandatory..... The Territories are included in this constitutional provision.

Mockey v. Coxe,18 How. 100 [Cherokee]; Mehlin v. Ice, 56 Fed. Rep. 12 [Cherokee]; Quesenbach v. Wagner, 41 Minnesota, 108." emphasis added.) . Resp. brief pg. 13. and *United States ex rel. Mackey v. Coxe*, 18 How. 100 (1856) among others referencing United States Indian territory within § 1738's "territory" definition as raised by Petitioners are ignored. Pet. brief fn. 45.

Indian Nations for legislative purposes were defined as 'states'.

"INDIAN TRIBE. A separate and distinct community or body of the aboriginal Indian race of men found in the United States.

2. Such a tribe, situated within the boundaries of a state, and exercising the powers of government and, sovereignty, under the national government, is deemed politically a state; that is, a distinct political society, capable of self-government; but it is not deemed a foreign state, in the sense of the constitution. It is rather a domestic dependent nation. Such a tribe may properly be deemed in a state of pupilage and its relation to the United States resembles that of a ward to a guardian. 5 Pet. R. 1, 16, 17; 20 John. R. 193; 3 Kent, Com. 308 to 318; Story on Const. 1096; 4 How. U. S. 567; 1 McLean, 254; 6 Hill, 546; 8 Ala. R. 48."

A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA AND OF THE SEVERAL STATES OF THE AMERICAN UNION by John Bouvier Revised Sixth Edition, 1856.

Respondents cite no case law stating §1738 applies only to states.

Inaccurate Argument (4):

Full Faith and Credit enforcement is premature

Respondents assert Full Faith and Credit enforcement is premature since Respondents Immunity is still to be decided below after three years of appeals and delays and 1738 was not originally raised in District Court. (Resp. page 11).

Accurate Response (4): Immunity issue is moot and 10th cir. rejected 1738 motion.

All the respondents totally ignored, thus conceding, that municipal-type respondents lack any state immunity, as held in *Cook County v. U.S. ex rel Chandler*, 2003 U.S. LEXIS 1957,*12-14;123 S. Ct. 1239 (as far back as Coke in England, municipal corporations were like any other 'natural' person not entitled to 'state' immunity where they can sue and be sued, as here) and *Jinks v. Richland County, South Carolina*, 2003 U.S. LEXIS 3241,*16-18;123 S. Ct. 1667; 538 U.S. (slip opinion April 22, 2003)(State political subdivisions are not the 'state' for statutory and Constitutional immunity purposes). Indeed, this Court has noted that States have no authority to authorize officials to violate the law and the official is personally responsible for wrongdoing in injunctive or mandamus situations. *See, Ex Parte Young*, 1908 U.S. LEXIS 1726, *66-67; 209 U.S. 123. Immunity for counter-claiming Navajo respondents is moot and futile below.

Respondents cite no authority giving state immunity to municipal-type organizations that can sue and be sued or to officials from Indian Nation Courts for Indian law and Indian Civil Rights Act violations occurring within Indian Nation borders, where they countersue, as here.

The 10th Cir. denied petitioners' petition for full faith and credit enforcement. Extra. Writ. App. 119a. Respondents fail to respond to Petitioners argument that this court is part of 'every court' within the plain language of 1738 and don't deny that the Federal district court has refused to date to follow the 10th cir. order for a *National Farmer Union Ins. Co. et al v. Crow et al*, 1985 U.S. LEXIS 27, 471 U.S. 845, 855-856 (1985) analysis since such an analysis of treaties, statutes, executive orders cuts directly against any Montana analysis, an indication of a lack of objectivity of the Federal Court below. A *Nat'l Farmer's* analysis for respondents is required first in *Indian Nation Courts* (id) and respondents refused to do such an analysis or exhaust their Navajo Nation Court remedies and now at this late date, seek relief that is procedurally barred. Petitioners have sought enforcement in federal courts for three years at all levels to no avail. The split between what is Indian Court jurisdiction between this Court and Congress and the Executive is too great to know how to rule. This petition for a writ is justified for this Court to answer.

Inaccurate Argument (5):

Respondents claim "there are still options available in the Lower Courts" (Resp. brief 12).

Accurate Response (5):

Federal Courts have no jurisdiction over Indian law and Indian Civil Rights violations within the *Exclusive Jurisdiction* of Indian Courts.

Enforcement below has been denied. Alleged federal court exhaustion defeats §1738's purpose

Respondents don't dispute the federal district court has denied § 1738 full faith and credit enforcement (Extra. Writ App. 203a-205a) for Truck and Attorney Ickes, ignored the Petitioners' motion for months while seeking to review new evidence, and the 10th circuit refused a petition for enforcement (Extra. Writ App. 119a). Respondents don't dispute that prior to even seriously studying the Navajo orders and judgment, the federal district judge pronounced they may be appealed and his decision wouldn't take long.... a statement at least appearing less than impartial (Pet. brief pg. 25). Further, Respondents do not debate that Federal Courts have no authority over Navajo Relief for Navajo violations and injuries, particularly since they countedsued and volunteered to be a party, and the delay has been a complete denial of due process for the Navajo Court petitioners. Futility is a reason for not requiring exhaustion. Justice delayed is justice denied. *Arnett v. Kennedy*, 416 U.S. 134 (1974); 1974 U.S. LEXIS 125 *140. Due Process is non existant for Indians, with Indian claims, and Indian orders in a non-Indian federal court.

'Exhaustion' defeats the purpose of §1738. If Congress wished Indian Nation territorial law proceedings to be subjected to Federal judiciary alleged 'exhaustion', appeals, oversight and control, it could and would have so said in § 1738, or this Court could have so said and did not in *Coxe, Atchinson, Embry v. Palmer*, 107 U.S. 3, 9(1883). Pet. Brief fn. 45. *See, Weinberger v.Salfi*, 422 U.S. 749, 766-767 (1975). Alleged 'exhaustion' in hostile federal courts completely defeats the primary preclusionary function of 28 USC § 1738 that is designed to preserve the independence of territories and possessions from Federal judiciary interference, promote finality of litigation, that Congress controls

with plenary, or absolute, authority.[1] Respondents cite no law wherein this Court is exempt from §1738's scope and intent.

Inaccurate Argument (6):

Full Faith and Credit does not Apply to Indian Nations' proceedings (Resp. brief pg.14)

"....[O]utside .... ICWA, and other limited areas with statutory authorization ,courts will not recognize tribal court judgments as being entitled to full faith and credit." (Resp. brief pg. 14). Because Congress Did not So State

Respondents cite to *Wilson v. Marchington*, 127 F.3d 805 (9th cir. 1997) cert denied April 28, 1999, by claiming that if Congress wished § 1738 to apply to Indian Nations it would have so said.

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[1] Most recently in *Camiolo et al v. State Farm Fire and Casualty, Co. et al*, 2003 U.S. App. LEXIS 13258,* the Third Circuit Court discussed Congressional intent to give full force to State laws by precluding Federal litigation of State proceedings so long as the State law does not run afoul of the Supremacy Clause. Here, we have independent (1) Navajo Nation Treaty law, (2) Congressional enactments supporting Indian Nation inherent sovereignty, (3) the exercise of the Navajo Nation authority in legislation the Respondents violated, and (4) the BIA-judicial program Executive interpretation of treaty powers, are all embodied in the Article VI Supremacy Clause, and is superior to State law for authority that does not derive from Congress or the Constitution. See, *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1192 (10th Cir. 2002) en banc) (footnote omitted); *Forty-Three Gallons of Whiskey, supra.* (Pet. Brief 2-4 listing all the Navajo law respondents undisputedly violated as found in the Navajo orders).

Accurate Response (6):

When a statute antedates the entity, one can not presume it does not apply.

This Court on More than One Occasion has Identified United States Indian Nations as being Indian Nation Territories and Respondents Should have so Informed this Court.

§ 1738 antedates the formal Indian Nation Court systems of today just as it does state administrative agencies. When the statute antedates the entities, one can not presume § 1738 does not apply, and repeals by implication are disfavored particularly of Treaty powers superior to state law. See, *U.S. v. Forty-Three Gallons of Whiskey*, 1876 U.S. LEXIS 1368,*8-9;93 U.S. 188; the 10th cir. ruling below, *MacArthur et al v. San Juan County et al*, 2002 U.S. App. LEXIS 20987, *14-15; 309 F.3D 1216 (10th Cir. 2002). *See, University of Tennesee, et al v. Elliot,* 1986 U.S. LEXIS 142,*13;478 U.S. 788 (§ 1738 "clearly does not represent a congressional determination that the decisions of state administrative agencies should not be given preclusive effect. " since § 1738 antedates state administrative agencies covered by § 1738). This Court found that § 1738 is statute that supports finality, and has a preclusive effect on retrying proceedings. Id. Respondents are seeking second and third bites at an apple, in federal courts that have no jurisdiction other than enforcement, and habeaus corpus, for Navajo relief. They should have bitten upon in Navajo Court with the *exclusive* jurisdiction over Navajo law violations and Indian civil rights violations, and have foreclosed that possibility. *Santa Clara Pueblo v. Martinez*, 436 U. S. 49, 51 Fn. 19-21. 25 U.S.C. §1303.

Respondents never affirmatively sought relief by cross-petitions or affirmative motions in Federal Court.

Halwood v. Cowboy Auto Sales, N. M. Supreme Court, 946 P.2d 1088 (1977) *cert denied*, Docket no. 98-858 (Feb. 22, 1999), applies full faith and credit to Navajo proceedings, opposite *Marchington*, and was completely ignored, and thus, conceded to by the respondents. Respondents had a duty to inform the Court of other cases that are in opposite to *Wilson v. Marchington*, and did not and did not dispute, ignored, and thus, conceded the reasoning and facts of petitioners. Pet. Brief. fn.23-25.

Inaccurate Argument (7):

28 U.S.C. §1261 controls and limits 28 U.S.C. § 1738. (Resp. brief 12-13).

Accurate Response(7) : Both Acts work together.

The clear wording of the all writs act § 1261 *supports* § 1738. Time tested Rules of Statutory Construction control this issue.

> "The Supreme Court and all Courts established by an act of congress may issue all writs necessary and appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

28 U.S.C. 1261

> "The records and judicial proceedings of *any* court of *any* such State, Territory or Possession, or copies thereof.... shall have the same full faith and credit in *every*

> court within the United States and its Territories and Possessions as they have by law or usage in courts of such State, Territory or Possession from which they are taken."

28 U.S.C. § 1738 Emphasis added.

Under cardinal rules of statutory construction,

> "We have repeatedly stated, however, that absent "a clearly expressed congressional intention," Morton v. Mancari, 417 U.S. 535, 551, 41 L. Ed. 2d 290, 94 S. Ct. 2474 (1974), [*37] "repeals by implication are not favored," Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n, 393 U.S. 186, 193, 21 L. Ed. 2d 334, 89 S. Ct. 354 (1968). An implied repeal will only be found where provisions in two statutes are in "irreconcilable conflict," or where the latter act covers the whole subject of the earlier one and "is clearly intended as a substitute." Posadas v. National City Bank, 296 U.S. 497, 503, 80 L. Ed. 351, 56 S. Ct. 349 (1936)."

Branch v. Smith, 2003 U.S. LEXIS 2709,*36-37;123 S. Ct. 1429. Emphasis Added.

"Where there are two acts upon the same subject, the rule is to give effect to both if possible.. The intention of the legislature to repeal 'must be clear and manifest." *United States v Borden Co.*, 308 U.S.S 188, 198 (1939). "In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government...."

Morton v. Mancari, 417 U.S. 535, 551 (1974). See, *Healy v. Ratta*, 292 U.S. 263, 270, 78 L. Ed. 1248, 54 S. Ct. 700 (1934) ("Due regard for the rightful independence of [Indian Nation Treaty and self-determination] governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined"). Id. *10 . See also, Pet. Brief fn. 42-44. Respondents ignore, and thus concede, that statutes are to be construed favorably in favor of Indians. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). (Pet. brief 21).

There is nothing in the clear wording of § 1261 that repeals the broad mandates upon 'every' federal court, including this Court, in § 1738, and Petitioners cite no authority for this Court to deny this Court is part of 'every' court within the scope of § 1738's mandatory requirements. 28 n. 1(1st Cir. 1998). Nor do respondents deny that Indian lands are possessions within the meaning of the statute. (Pet. brief fn. 40) *United States v. Alford*, 1927 U.S. LEXIS 26, *4-6; 274 U.S. 264. Undisputedly, Congress EXPRESSLY intended that Federal Courts should not be second guessing Indian Courts for Indian law and Indian Civil Rights Act violations by retrying the cases or applying federal law for Indian law violations, or by demanding some form of 'federal' court alleged exhaustion. 25 U.S.C. 1303. *Santa Clara* at 51 fn. 19-21. See, *Kiowa Indian Tribe of Oklahoma v. Hoover*, 1998 U.S. App. LEXIS 15769,*;150 F.3d 1163;

> "The Rooker-Feldman doctrine bars "a party losing in state court ... from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself

> violates the loser's federal rights." citations omitted."

Id. at *17.

For all the same prudential reasons federal district courts are not appellate courts for losing parties in state court, district courts even more so are not appellate courts for losing parties under Indian law and Indian civil rights violations judgments, particularly when they are counterclaiming parties.

Even more than states, § 1738, Treaties, Article VI supremacy clause, Article I and Article IV Congressional 'plenary' powers over territories and possessions and the Indian commerce clause, prevents district courts from being appellate courts for Indian Nation law as occurred here. Under the Rooker-Feldman doctrine, Indian Nations' territorial proceedings orders and judgments, should go directly to this Supreme Court. 'Exhaustion' annhilates Congress' §1738 intent.

Respondents fail to show how any other statute or Constitutional article can preclude the clear meaning of §1738 of 'every court' applying to this Court, in light of foregoing authorities.

APPENDIX B

Case No. 2-00CV-0584K

IN THE UNITED STATES DISTRICT COURT OF
THE STATE OF UTAH
CENTRAL DIVISION

DR. STEVEN MACARTHUR, DR. NATHANIEL PENN, MICHELE LYMAN, HELEN VALDEZ CANDACE LAWS, PAUL KEITH, DOROTHY KEITH, LINDA CACAPARDO, SUE BURTON, AMY TERLAAK, ALISON DICKSON, CANDACE HOLIDAY, NICHOLE ROBERTS, DONNA SINGER, FRED RIGGS,
Plaintiffs,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICE DISTRICT, COMMISSIONER TYRON LEWIS, COMMISSIONER BILL REDD, CRAIG HALLS, COMMISSIONER MARK MARYBOY,[1] REID WOOD, CLEAL BRADFORD, ROGER ATCITTY, JOHN LEWIS, JOHN HOUSEKEEPER, KAREN ADAMS, PATSY SHUMWAY, DR. JAMES REDD, DR. JONES, DR. NELSON, RICHARD BAILEY, SAN JUAN FOUNDATION, MARILEE BAILEY, ORA LEE BLACK, GARY HOLLADAY, LAURIE WALKER, FARMER'S/TRUCK INSURANCE, ST. PAUL'S INSURANCE, CARLA GRIMSHAW, GLORIA YANITO, JULIE BRONSON, their assigns, principals, corporations or associations, known and unknown, incorporated or unincorporated, and (other John and Jane Does as yet to be identified each in their individual and official capacities,
Defendants.

MARYBOY RESPONSE TO VERBAL OBJECTION TO HIS SELECTION OF COUNSEL REQUEST FOR EVIDENTIARY HEARING AND ORAL ARGUMENT

Judge Dale Kimball

Commissioner Mark Maryboy, by his special temporary counsel, Douglas R. Short, Esq., hereby responds to the objection to Mr. Maryboy's choice of legal counsel, which objection was made by Mr. Trentadue at the hearing held on February 13, 2001.

REQUEST FOR EVIDENTIARY HEARING AND ORAL ARGUMENT

Commissioner Maryboy respectfully requests an evidentiary hearing and oral argument in order to have an opportunity to fully address the issue unless the Court determines based upon the written submissions that Mr. Maryboy is entitled to select his own counsel without interference from the codefendants.

BACKGROUND

The dispute in this matter arises from the fact that Commissioner Maryboy, regardless of who serves as his counsel, does not wish to present a united defense with many of his codefendants. Indeed, as an elected County Commissioner he has the duty to investigate many of the allegations.

As a Navajo, Commissioner Maryboy over the past fifteen years has personally experienced and witnessed acts he believes evidence a pattern and history of discrimination against Navajos by many of his codefendants. He has also seen what he believes to be

unlawful conduct on the part of some of his codefendants.

As an elected County Commissioner, in his official capacity, he wants the alleged discrimination and unlawful activity to stop, in accordance with his official duties at issue in this case. He wants to independently control his own defense in harmony with those duties. The codefendants, however, are seeking to control his defense by interfering with his choice of counsel.

MARYBOY'S RIGHT TO CONTROL HIS OWN CASE

The Utah Supreme Court has unequivocally declared who controls an official's defense, even when sued in his official capacity. In *Fowler v Gillman*, 290 P. 358 (Utah 1030), the Court imposed costs against an official personally when the official was compelled to perform his duty, event though he was sued in his official capacity. The Court stated

> We, however, lay down this rule: Where in a proceeding of this nature against a public officer, he arbitrarily or capriciously and in bad faith, as here found, neglected or refused to perform a duty by law enjoined upon him and resulting from his office, and the party beneficially interested is put to costs in bringing a proceeding to compel the performance of the duty and prevails therein, the public officer is himself liable for costs. The point made that the judgment far costs should not go against the appellants personally because they were sued in their official capacity and

not as individuals is not tenable. In 38 C.J. 954, the author states:

> "The general rule is that public officers are personally liable for costs incurred in mandamus proceedings to compel them to perform their duties which they are required by law to perform."
>
> ... In a proceeding against a public officer to compel him to perform a required and demanded duty which he refused to perform, it is he and no one else who controls the defense in such particular. Hence, if the applicant prevails, the costs naturally ought to go against him who wrongfully refused to perform the required and demanded duty. Costs in such case may not be awarded against the county or other municipal body, or ordered paid out of county funds ... for in such case the county or other municipal body is not liable for such acts or omissions of the public officer or officers ....

As is readily evident from the forgoing ruling, Mr. Maryboy has the right and a substantial personal interest in controlling his own defense given the fact that the reason he is named in this matter in his official capacity is to compel him to perform his duties. He should not be required to walk lockstep with codefendants whom he fears may be refusing to perform their duties arbitrarily and in bad faith. To do so could make him personally liable for any costs. He ought to be free to select counsel he believes is best able to protect his interests by helping him to perform his duties.

RETALIATION

In order to be faithful to his official duties, Commissioner Maryboy wanted to submit to the Court his affidavit regarding some of his experiences and observations so that the Court may be able to stop the alleged discrimination and unlawful conduct. Ever since he spoke out through the affidavit, however, his codefendants have been using every means available to prevent him from breaking ranks, now including this objection.

In order to keep him quiet, his codefendants are currently seeking a gag order on Mr. Maryboy from this Court. Amazingly, his own counsel of record joined in the motion for a protective order to gag him.

This is a classic and transparent case of the majority trying to silence and control the minority because the minority is questioning the conduct of the majority. Commissioner Maryboy has long been a vocal critic of many of his codefendants so they have been using his own attorney of record to fight him

Mr. Maryboy has been trying for over four months to get new counsel, but has, been thwarted by his codefendants. Codefendant Truck/Farmers Insurance Company has steadfastly refused him the ability to select his own counsel without their interference, and has even threatened him in several letters that it will withdraw his defense if he does not cooperate with the defense of the other codefendants. [2] His own counsel of record, Jesse Trentadue, refused for over two mouths to withdraw inspite of his blatant conflicts arising from the dual representation, even though Mr. Maryboy gave him clear and unequivocal notice in three letters that he did not consent to the dual representation. [3] The representation at the February 13th hearing by Mr.

Trentadue that he was only told about the conflict a week before and was fired that morning at 2:00 am is patently false as the letters reveal In direct violation of Rule 1.9, Suitter Axland continues to act in a manner materially adverse to Mr. Maryboy's interests in this case by opposing his choice of counsel and advising the County to not provide him a defense.

His fellow codefendants, the County Commissioners and the County Attorney, have refused to provide him any defense, by any counsel, even though the State Governmental Immunity Act expressly requires the County to provide him a defense unless he acted with malice or fraud. Utah Code Ann. 63-30-36. [4] This denial of his statutory property right is clearly arbitrary and capricious and obviously designed to keep Commissioner Maryboy from defending himself in the case in the manner he wishes.

San Juan County Attorney Craig Halls, has personally advised and warned Commissioner Maryboy that he has a fiduciary duty to the County to agree with the other Commissioners and to not say or do anything to hurt their case (and obviously Mr. Halls' own cases and personal interests). Mr. Halls has also advised Commissioner Maryboy that since he has not cooperated with their defense, the County would deny him a defense.

It is Commissioner Maryboy who is acting in his official capacity in the best interests of the County, the Health District and the taxpayers. His codefendants, who are being sued in their individual capacities for actual and punitive damages, are acting in their own best interests.

No one believes that Mr. Maryboy's codefendants are looking out for his best interests by making this

objection. In deed, any assertion that Commissioner Maryboy needs somebody to look out for him is racially paternalistic. Mr. Maryboy is perfectly able to make his own decisions, and as an elected County officer, has every right and power to chose how to defend himself in his official capacity.

The ultimate issue here is whether Commissioner Maryboy's codefendants, individuals who have obvious and severe conflicts of interest with Commissioner Maryboy's interests, are going to be allowed to interfere with his selection of counsel to represent him.

STANDING

The question of whether Commissioner Maryboy's codefendants even have standing to object to Commissioner Maryboy's selection of counsel is dispositive of this objection. Codefendants simply do [illegible] standing to object.

The concept of a conflict of interest is that there are conflicts of interest between the current or former clients of the attorney so as to impair the attorney's ability to provide undivided loyalty to his clients, not to some third party who actually has interests adverse to his clients.

The codefendants are not clients of Mr. Short and therefore simply do not have any standing to claim Mr. Short has a conflict of interest. They cannot claim that Mr. Short's loyalty to them is somehow being impaired. So why are they claiming a conflict?

The Comments to Rule 1,7 of the Utah Rules of Professional Conduct warn that the cry of conflict by opposing parties should be entertained only in rare

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circumstances and with "caution," because it could be a form of "harassment."

Conflict Charged by an Opposing Party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. .., Where the conflict is such as to call into question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment.

The responsibility for resolving any question of conflict clearly belongs with Mr. Short. He has fulfilled that responsibility in accordance with the rules. Commissioner Maryboy sought out Mr. Short to represent him. Mr. Short is uniquely familiar with the conflict issues surrounding the representation of government officials, in both their official and personal capacities, as well as the rights and duties of government officials when involved in litigation. He has carefully reviewed the rules, considered the potential conflicts, consulted Bar Counsel, consulted fully with both Commissioner Maryboy and the former clients, and obtained the consent of the former clients after they consulted independently with their own counsel in accordance with rule 1.9. There is no question Mr. Short has conscientiously approached the question with due diligence. There is no reason for the court to infer that Mr. Short has neglected his responsibility to resolve any potential conflict.

Mr. Short is fully convinced any question of a conflict is resolved in favor of Mr. Short being able to represent Commissioner Maryboy, as requested by Mr. Maryboy. If he were not convinced, he would not risk the possibility of a bar complaint to defend Mr. Maryboy's interests. In deed, the fact that Mr. Short is willing to face such a risk at the request of Commissioner Maryboy evidences his loyalty to Commissioner Maryboy, a loyalty that has clearly been lacking thus far from his former counsel of record.

The only reason we are even addressing a conflict question is because the codefendants, who are in effect opposing parties, are raising it. This is not, however, the type of objection anticipated or allowed in the Comment. There is no "clear" question regarding the "fair or efficient administration of justice" so as to allow opposing counsel to raise a challenge.

If Mr. Maryboy has made an informed decision that he desires to be represented by Mr. Short, allowing him to select his own counsel is justice. Allowing his political and legal opponents to stop him from having his counsel of choice would be the clear injustice.

The only real question prompting Mr. Trentadue's objection is whether the other codefendants are going to face are opposing counsel with significant knowledge of the case who is willing to defend Commissioner Maryboy in the manner he wishes to be defended, i.e., an opposing counsel who will help Commissioner Maryboy break ranks with them, thereby possibly placing their own defenses at risk, in order to protect himself, the County, the Health District and the taxpayers.

This strategic disagreement as to how Mr. Maryboy should defend his own case does not give the codefendants standing to challenge his choice of counsel. While the possibility of Mr. Short representing Commissioner Maryboy is not desirable to the codefendants, because of its possible adverse impact on them personally, it is hardly going to impair the fair and efficient administration of justice if Mr. Maryboy has counsel willing to follow his wishes.

There are only two rules of professional conduct that address the possibility of a conflict. It is clear under the express terms of both that the codefendants have no rights at issue which could give them standing.

CONFLICT OF INTEREST UNDER RULE 1.7

The codefendants have not identified how Mr. Short's representation of Mr. Maryboy will constitute conflict, but they are likely going to rely on Rule 1.7. The fact of the matter is, however, that Rule 1.7 does not even come into play because Rule 1.7 applies only to conflicts between current clients.

Since Mr. Short is no longer representing (or better stated, advising) plaintiffs Singer, Riggs and Dickson in the Navajo Court case, and has no other current attorney- client relationship in this case, Rule 1.7 simply does not apply.

Since the codefendants do not have any attomey-client relationship with Mr. Short, they simply do not have standing under Rule 1.7 to challenge Commissioner Maryboy's selection of his own counsel. Mr. Short, if he is allowed by the Court to represent Mr. Maryboy, will represent only Mr. Maryboy. He will not have any attorney client relationship with any of the other

codefendants or plaintiffs so as to trigger Rule 1.7.[5] Consequently, Rule 1.7 simply does not come into play.

CONFLICT OF INTEREST WITH FORMER CLIENTS UNDER RULE 1.9

The codefendants may also seek to argue that Mr. Short has a conflict under Rule 1.9 because three of the plaintiffs may be considered his former clients. The codefendants, however, clearly have no intent to be protected under Rule 1.9 because they are not former clients.

It is a safe bet the defendants have not objected in order to protect the interests of the former clients, which is the purpose of Rule 1.9. But, in order to provide the Court with the full picture, Mr. Maryboy will nevertheless address the provisions of Rule 1.9.

Under Rule 1.9, a former client may freely waive any potential or actual conflict and consent to former counsel representing an adverse party, even in the same case. The Rule expressly provides;

A lawyer who has formerly represented a client in a matter shall not thereafter: (a) represent another person in the same or a substantially factually related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; ...

Mr. Short has consulted with the former clients, and they have willingly consented to his new representation of Commissioner Maryboy. Whether one considers this to be then same matter, or simply a factually related matter, the Rule makes it clear that the former clients have this right to waive any conflict.[6]

CONCLUSION

The self-serving objection of the codefendants, whether based on Rule 1.7 or Rule 1.9, is not based on any recognizable rights or interests of defendants. It is just one more example of how the codefendants have been harassing Commissioner Maryboy since he revealed that he is not willing to present a united defense on all issues. Such retaliation should not be sanctioned. Mr. Maryboy therefore respectfully requests that the Court enter an order expressly authorizing Mr. Maryboy to select his own counsel to defend him in this case without any further interference or impediment by the codefendants.

ATTORNEY FEES

As previously noted, Commissioner Maryboy is entitled to a defense provided at the expense of the County under the Utah Governmental Immunity Act. Thus far the County has refused to provide him a defense, and yet it has caused him to incur legal fees to oppose their objection. If Mr. Maryboy prevails on this objection, he respectfully requests in accordance with the Governmental Immunity Act that the County be ordered to promptly pay his attorney fees in defending against this objection within two weeks of submitting a bill.

Respectfully Submitted this 23rd Day of February, 2001

Douglas R. Short, Esq.
Special Counsel for
Commissioner Mark Maryboy

FOOTNOTES -

[1] Official capacity only.

[2] SEE EXHIBIT A (November 6th letter from Rose Reilley to Jennifer King (counsel to Truck Insurance) requesting that Maryboy be allowed to control his own defense and retain his own counsel); EXHIBIT B (November 7th letter from Barbara Barrett (counsel for Utah Association of Counties Insurance Mutual) directly to Maryboy warning him that his affidavit was a breach of his duty to cooperate and would void his coverage if he did not immediately cooperate and cease taking actions which would "jeopardize" the legal position of the County and the Individual County Commissioners); EXHIBIT C (November 13th letter from King to Reilley refusing to allow Mayboy to hire own counsel); EXHIBIT D (December 7th letter from Short to King explaining conflicts after verbal refusal by King to allow Maryboy to select his own counsel); EXHIBIT E (December 19th letter from King to Short acknowledging conflict and agreeing to hire Short and warning that Maryboy must cooperate or risk losing defense); EXHIBIT F (December 20th letter from King to Short refusing to allow Maryboy to select Short); EXHIBIT G (January 26th letter from King directly to Maryboy warning him to cooperate or risk losing his defense).

[3] SEE EXHIBIT D (December 7th letter from Short to King laying out conflicts of Suitter Axland, which letter was copied to Mr. Trentadue and hand delivered by short to Kathleen Liuzzi); EXHIBIT H (February 7th letter from Short to Trentadue rehearsing Suitter Axland's conflicts in greater detail); EXHIBIT I (February 8th letter from Trentadue to Short refusing to recognize conflict, but agreeing to withdraw based on

Maryboy's formal request and trying to shift his burden of preparing application to withdraw onto Maryboy); EXHIBIT J (February 12/13th letter from Short to Trentadue clarifying Trentadue had not been asked to withdraw by Maryboy, but rather Maryboy was simply making him aware of his unilateral duty to withdraw given all of the conflicts and misconduct committed by Suitter Axland towards its client of record Mr. Maryboy)

[4] Since there is no allegation by the plaintiffs that Commissioner Maryboy ever acted with fraud or malice, Mr. Maryboy is unquestionably entitled to a defense under the Governmental Immunity Act, regardless of who his counsel is.

[5] The codefendants may erroneously assert that since they believe Mr. Maryboy owes some fiduciary duty to his codefendants, Mr. Short would also owe them some duty of loyalty that may be impaired by his previous involvement in the Navajo Court case. This simply is not true. There Is no attorney-client relationship created between an attorney and a codefendant of his client when his client does not wish to provide a united defense and may in fact have causes of action against his codefendants. Mr. Maryboy should be able to have counsel he trusts to advise him of his fiduciary duties.

[6] The former clients have been advised that if Mr. Short undertakes Mr. Maryboy's representation that he may be required to oppose their interests, motions and objectives, it so directed by Mr. Maryboy. Given their faith and confidence in Mr. Maryboy as their elected representative and his willingness to try stop any alleged discrimination or unlawful activity, the plaintiffs are willing to take this risk. That is their choice, not the choice of the other defendants.

SUPPLEMENTAL

BRIEF

(10)

No. 02-1774; 02-1253

In the

Supreme Court of the United States

IN RE: FRED RIGGS, DONNA SINGER and AL DICKSON

FRED RIGGS, DONNA SINGER and AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, BILL REDD, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE AND DENNIS ICKES; and new district officers, NETTIE PRACK (official capacity only), GLEN IMEL (official capacity only), CLEAL BRADFORD (official capacity only), JOHN FELMETH (official capacity only) and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

Petition for a Writ of Certiorari (on Rehearing) and Petition for a Writ of Mandamus and Prohibition to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' SUPPLEMENTAL AUTHORITY BRIEF

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SUPPLEMENTAL AUTHORITIES IN SUPPORT OF THE PETITIONERS PETITION FOR A WRIT OF MANDAMUS AND PROHIBITION AND PETITION FOR REHEARING OF PETITION FOR CERTIORARI

Now come the Petitioners pursuant to Supreme Court rule 15 to inform the Court of (1) new legislation S. 578 that should impact this case's petition for rehearing for the petition for certiorari (02-1253) and petition for a writ of mandamus (02-1774) involving the inherent sovereign authority of Indian Nation Courts equally over all 'persons'; and (2) new case law.

NEW LEGISLATION WILL EFFECT THIS CASE

On March 3, 2003 Senator Inouye submitted to the Senate S. 578 **Tribal Government Amendments to the Homeland Security Act of 2002.** [1] The bill's announcement read as follows:

> "INTRODUCTION OF BILLS AND JOINT RESOLUTIONS – (Senate - March 07, 2003)[Page: S3369]
>
> > "S. 578. A bill to amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security, and for other purposes; to the Committee on Governmental Affairs."

Section 13 is the pertinent part that deals with Indian Nation inherent sovereign authority over non-Indians being reserved except by *Congress*' express

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[1] Despite a thorough investigation looking for what some popularly call the "Hicks' fix", even as to calling several Senator's offices *including* Senator Inouye's office, Plaintiffs' counsel did not find any indication that Senator Inouye had submitted a bill supporting Indian inherent sovereignty. Nor did the initial announcement of the S. 578 above describe precisely how the bill applied to Indian Nation governments' inherent sovereignty.

restrictions.[2] The bill is to be heard July 30, 2003 before the Senate committee on Indian Affairs. This bill clearly supports the Petitioners position of the lack of Congressional and Executive express divestiture of Indian Nation inherent sovereignty over non-Indians as would be normally found in Treaties, executive orders, statutes, BIA-judicial program contracts, express executive branch action, all within the examination under **Nat'l Farmers Union Ins. Co. v. Crow** , 471 U.S. 845, 855-856 (1985) that the federal Court below has refused.

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[2] "SEC. 13. CONGRESSIONAL AFFIRMATION AND DECLARATION OF TRIBAL GOVERNMENT AUTHORITIES.(a) IN GENERAL- For the purpose of this Act, Congress affirms and declares that the inherent sovereign authority of an Indian tribal government includes the authority to enforce and adjudicate violations of applicable criminal, civil, and regulatory laws committed by any person on land under the jurisdiction of the Indian tribal government, except as expressly and clearly limited by–(1) a treaty between the United States and an Indian tribe; or

(2) an Act of Congress.

(b) SCOPE- The authority of an Indian tribal government described in subsection (a) shall–

(1) be concurrent with the authority of the United States; and

(2) extend to–

(A) all places and persons within the Indian country (as defined in section 1151 of title 18, United States Code) under the concurrent jurisdiction of the United States and the Indian tribal government; and

(B) any person, activity, or event having sufficient contacts with that land, or with a member of the Indian tribal government, to ensure protection of due process rights."

NEW CASE LAW

On June 30, 2003, the Third Circuit Court's *Camiolo v. State Farm Casualty et al*, 2003 U.S. App. LEXIS 13258, a precedential decision, discusses and defines the reasoning behind 28 U.S.C. §1738 in giving full faith and credit to States, territories and possessions. *Camilio* observed that Supreme Court holds that ; (A) "elementary principles of federalism and comity" are "embodied in the full faith and credit statute, 28 U.S.C. § 1738." [citations omitted] Id. [*22]; (B) a venerable principle of Constitutional jurisprudence is that a "statute is a 'public act,' faith and credit must be given to its provisions[.]"[citations omitted]; (C) so as "not [to] unduly interfere with the legitimate activities of the States [territories, possessions]," [citation omitted] and to enforce the protections intended to States [territories,possessions] by the Full Faith and Credit Clause of the Constitution [citations omitted]"; id.; (D) Congress mandates that: "The Acts of the legislature of any State, Territory, or Possession of the United States . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.28 U.S.C. § 1738." ; (E) that, "to the extent that the Acts of State [territory,possession] legislatures do not conflict with the federal Constitution, statutes, and regulations and, thus, run afoul of the Supremacy Clause, U.S. Const., Art. VI, cl. 2, the federal courts are obliged to afford the "Acts of state [territories, possessions] legislatures" the same respect that the States' [territories, possessions'] own courts would grant those statutes. ... [citations omitted]." Id. [23]. Emphasis added.

Camilio also found that "Federal law is, of course, supreme; "[t]o [ ] federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl.

2." *Liner v. Jafco, Inc.*, 375 U.S. 301, 309, 11 L. Ed. 2d 347, 84 S. Ct. 391 (1964)." [*36].

Undisputedly the Navajo Treaties of 1849 and 1868, the Navajo Court statutes, Navajo Bill of Rights, Navajo Preference in Employment act, as found violated by the defendants were Navajo duly enacted and extensions of legitimate Navajo sovereignty fully protected by Congressional acts. As the Article VI Supreme law, these Navajo laws are protected by Treaty, and Congressional mandates found in 28 USC §§450 (self-determination act); 450(e) (Indian preference in employment act); 1301-1328 (Indian civil rights act); 3601-3663 Indian Tribal Justice Support Act.

The *Rooker-Feldman* doctrine, which precludes lower federal court jurisdiction over matters litigated in state court or "inextricably intertwined" with a state adjudication should more importantly apply here when a Treaty, the Article VI supreme law of the land, is involved, and authority unlike states, does not derive from Congress. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); *see also Desi's Pizza, Inc. v. City of Wilkes-Barre*, 321 F.3d 411 (3d Cir. 2003).

CONCLUSION

Based upon this new legislation and new case law, the petition for rehearing for the Petition for Certiorari 02-1253 and the Petition for a Writ of Mandamus and Prohibition 02-1774 should be accepted, and the Navajo Court orders for violations of Navajo law, never denied by the respondents (2 of whom are Navajo), who volunteered for Navajo Court jurisdiction by filing non-compulsory counterclaims, for violations occurring within the Navajo jurisdiction under 18 U.S.C. 1151, should be granted.

Respectfully Submitted,

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No. 02-1774

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In The Supreme Court of the United States

FRED RIGGS, DONNA SINGER, and AL DICKSON,

Petitioners,

v.

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE AND ATTORNEY DENNIS ICKES, and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Respondents.

On Petition For Writ Of Mandamus And Prohibition To The United States Court Of Appeals For The Tenth Circuit

HEALTH DISTRICT RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO PETITIONERS' SUPPLEMENTAL AUTHORITY BRIEF

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ARGUMENT

Respondents San Juan Health Services District, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway, John Lewis and Lauren Schafer[1] respectfully submit this Supplemental Brief in Response to Petitioners' (first) Supplemental Authority Brief entered on the docket July 2, 2003. For the reasons set forth below, the cases cited in Petitioners' Supplemental Authority Brief do not support the relief sought by petitioners in their Petition for Writs of Mandamus and Prohibition.[2]

Petitioners' assertion that *Nguyen v. United States*, 123 S. Ct. 2130 (2003) upheld Congress' authority under Article IV of the Constitution to make all needful rules and regulations respecting territories or possessions is misleading. As an initial matter, a tribe is not a territory. Moreover, while the *Nguyen* opinion referred to Congress'

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[1] In this Court, petitioners have purported to add as parties (in their official capacities only) certain Health District board members who joined the board after petitioners filed this action, including Nettie Pract, Glen Imel and Cleal Bradford. Because suit brought against governmental officers in their official capacity is equivalent to suit against the entity, *McMillan v. Monroe County*, 520 U.S. 781, 785 n.2 (1997) (citations omitted), joinder of these board members is unnecessary. Respondents therefore have retained and used the original caption and parties named by petitioners. However, to the extent this Court deems joinder of the new board members in their official capacities proper, such parties should be considered represented by this response to petitioners' Supplemental Authority Brief.

[2] While petitioners apparently filed the Supplemental Authority Brief before respondents filed their Brief in Opposition, it was not served on respondents until July 8, 2003, after respondents filed their Brief in Opposition. Thus, respondents did not previously have an opportunity to respond to the arguments made by petitioners in the Supplemental Authority Brief.

Article IV authority with respect to territories, that power was not at issue and was not addressed by the Court. Rather, the Court addressed whether a panel of an appellate court composed of two appellate court judges appointed by Congress pursuant to Article III and one territorial district court judge appointed pursuant to Article IV had the authority to hear an appeal. This issue has nothing to do with the relief sought by petitioners.

Petitioners cite *American Insurance Ass'n v. Garamendi*, 123 S. Ct. 2374 (2003), for the proposition that agreements made by the executive branch preempt or trump state law. From this proposition, petitioners argue that because the Navajo judicial program is funded by an executive branch agency (Bureau of Indian Affairs), its orders may be enforced as against non-Indians, including Truck Insurance and Dennis Ickes. *Garamendi* did not address tribal court jurisdiction but held only that an exercise of state power that touches on foreign relations must yield to the National Government's policy. This case does not involve a conflict between national foreign policy and state law. Petitioners' argument is an unwarranted extrapolation of *Garamendi's* holding.

Petitioners rely on *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003) in support of their argument that by enacting the Indian Civil Rights Act and Self-Determination Act ("ICRA"), 25 U.S.C. § 1301 *et seq.*, Congress delegated to tribal courts jurisdiction over non-Indians for any act occurring on land within the exterior boundaries of a reservation. However, *Hibbs* addresses the availability of money damages in federal court by state employees suing under the Family Medical Leave Act. *Hibbs* has nothing to do with ICRA or a tribal court's authority over non-Indians.

Petitioners also rely on Justice O'Connor's conclusion in her concurrence in *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003) that the Equal Protection Clause is essentially a direction that all persons similarly situated should be treated alike. From Justice O'Connor's statement, petitioners argue that the equal protection requirements imposed on tribes under ICRA means that both Indians and non-Indians are subject to tribal court jurisdiction for any action occurring within the exterior boundaries of a reservation. In fact, the equal protection guarantees of ICRA do not address the parameters of tribal court jurisdiction but simply require that the tribe (and therefore its courts) provide equal protection to all those within the tribe's jurisdiction. More importantly, petitioners' argument fails because non-Indians and tribe members are not similarly situated with respect to tribe membership.

Petitioners also argue that the Court should review this case based on a purported "split" between the Eighth Circuit and the Seventh Circuit on the issues raised by this case. *Compare United States v. Lara*, 324 F.3d 635 (8th Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No. 03-107) *with United States v. Long*, 324 F.3d 475 (7th Cir. 2003), *petition for cert. filed,* 71 U.S.L.W. 3791 (U.S. June 10, 2003) (No. 02-1801). Actually, neither case addresses tribal court jurisdiction over non-Indians. Moreover, *Long* and *Lara* are not in conflict but rather address different issues. In *Long*, the Seventh Circuit addressed whether the Menominee tribe's criminal jurisdiction over its own members flowed from the tribe's independent sovereign powers or was based on powers delegated by Congress. *Long* found that the source of the tribe's powers over its own members was debatable because of a series of congressional acts that altered the

Menominee tribe's status as an Indian tribe. Pursuant to these congressional acts, the Menominee tribe's powers were terminated and later restored by Congress. The court ultimately found that, notwithstanding Congress' termination and later restoration of the tribe's powers, the tribe's criminal power over its *own* members was properly classified as part of the tribe's inherent sovereign powers. *Long* does not address or support petitioners' claim that the Navajo tribal court has inherent civil sovereign power over non-Indians.

Unlike *Long*, in *Lara*, the Eighth Circuit held that the power over non-member Indians given by Congress to tribes by way of the Duro amendments was properly classified as delegated power, not inherent power. Again, *Lara* simply does not address or support the relief sought by petitioners here.

Petitioners also erroneously cite *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003), as upholding several of petitioners' arguments. Petitioners are correct that *Seneca-Cayuga* cites the definition of "Indian country" found in 18 U.S.C. § 1151, but the case did not address that definition nor suggest that it provides a basis for tribal court jurisdiction over non-Indians. Petitioners also argue that *Seneca-Cayuga* demonstrates that the Court should uphold Congressional intent in interpreting statutes. Here, however, for the reasons set forth in respondents' Brief in Opposition, petitioners fail to point to any legislation demonstrating Congress' intent to bestow tribes with unfettered jurisdiction over non-Indians for any action occurring within the exterior boundaries of a reservation.

Finally, petitioners cite to *Seneca-Cayuga's* alleged reliance on the principle that deference should be given "the Executive's [sic] carrying out a statutory scheme, here a BIA-judicial program funding agreement demanding uniform and fair use of Navajo law" pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). As *Seneca-Cayuga* noted, in *Chevron,* the Court held that an executive agency's interpretation of a statutory scheme it is entrusted to administer is entitled to deference. The agency findings or action on which petitioners rely is an alleged agreement between the tribe and the Bureau of Indian Affairs providing funding for the tribal courts. The funding agreement simply does not address tribal court subject matter jurisdiction over non-Indians. Thus, *Seneca-Cayuga* is inapplicable to petitioners' arguments.

Petitioners cite to *Kennedy v. Hughes*, 2003 LEXIS 5475, at *12 (10th Cir. 2003), claiming that it held Indian nation forums have exclusive jurisdiction for vindication of the alleged ICRA violations asserted here. As an initial matter, this action does not involve ICRA claims. ICRA protects only against wrongdoing by tribal governments, not the private, non-Indian parties against whom petitioners seek relief. Petitioners also misstate *Kennedy's* holding. In *Kennedy*, members of two different Indian tribes brought suit in federal court against various tribe officials claiming violations of ICRA. The district court dismissed plaintiffs' claims, holding no private right of action existed under ICRA except with respect to habeas corpus actions. The Tenth Circuit affirmed, finding that the only exception to the above rule is where the dispute involves a non-Indian party, a tribal forum is not available, and the dispute involves issues falling outside of internal tribal

affairs. *Id.* at **8-9. In such a case, *Kennedy* held that a party may bring suit against a tribe or its subsidiaries in *federal* court. Thus, *Kennedy* does not support petitioners' arguments here in favor of tribal court jurisdiction.

Petitioners also cite *Penn v. United States*, 324 F.3d 992 (8th Cir. 2003), *vacated by, reh'g. denied*, 2003 U.S. App. LEXIS 13587 (8th Cir. N.D., July 7, 2003), as upholding Indian Court authority over non-members. As noted above, the Eighth Circuit's opinion on which petitioners rely has been vacated. *Id.* In addition, petitioners misrepresent the holding of the vacated opinion. In *Penn*, the plaintiff, a non-Indian, sued federal BIA officials and federal and state law enforcement officials in federal court alleging they violated her constitutional rights by serving and executing a tribal court order excluding her from the Standing Rock Sioux Indian Reservation. Defendants moved to dismiss on the basis of qualified and absolute immunity, which motion the district court denied. In its original opinion, the Eighth Circuit reversed and remanded with directions to enter summary judgment for the defendants. However, the Eighth Circuit specifically noted that its holding was not based on a finding of tribal court subject matter jurisdiction, and it did not need to reach that issue to resolve the case. *Id.* at 997 ("We need not resolve whether Judge Dog Eagle actually had jurisdiction over this matter.")

Petitioners also rely on *International Bancorp, LLC v. Societe des Bains de Mer Cercle Etrangers a Monaco*, 329 F.3d 359 (4th Cir. 2003). Although *International Bancorp* cites the Commerce Clause, the case addressed the scope of the Lanham Act and the Anticybersquatting Act and has

nothing to do with the authority of the tribal courts over non-members.

CONCLUSION

For the reasons stated above, petitioners' supplemental authorities do not support the relief they seek. The petition for writs of mandamus and prohibition should be denied.

Respectfully submitted,

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(8)

No. 02-1774

In the

Supreme Court of the United States

IN RE: FRED RIGGS, DONNA SINGER and AL DICKSON

ON PETITION FOR WRIT OF MANDAMUS AND PROHIBITION TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S RULE 15 SUPPLEMENTAL BRIEF

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6 pp

NOW COME THE PETITIONERS, pursuant to United States Supreme Court rule 15.8 to file a supplemental brief "calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing", as follows:

BRIEF BACKGROUND

This case involves this Court enforcing Navajo Court orders under 28 U.S.C. 1738 full faith and credit, against all respondents as listed in the petition, for Navajo law violations, harming two Navajo enrolled members and the spouse of a Navajo enrolled member, within Navajo borders as defined by Congress in 18 U.S.C. 1151 and Navajo law. Respondents stipulated to Navajo jurisdiction by filing Navajo counterclaims, thus waiving any immunity if any existed, never exhausted Navajo Court remedies, waiving them, or filed a cross-petition for relief here or in federal court below. It is a simple matter of enforcement..... except in 2001, *Nevada v. Hicks*, 2001 U.S. LEXIS 4669, 533 U.S. 353, "[t]he majority's sweeping opinion, without cause, undermines the authority of tribes to "'make their own laws and be ruled by them'" (LEXIS *59. 85 J. O'Connor, Breyer, Stevens concurrence) undermined economic development, business and government to government relations, and destroyed internal governance to the point that Indian Courts if they adhere to Supreme Court law MUST distribute justice based upon race, annihilating 25 U.S.C. 1302. [1]

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[1] If two Navajo members are civilly assaulted identically, under Hicks, only the Navajo member with the Navajo assailant gets relief under Navajo law. The Congressionally mandated equal protection express divestiture of Indian Nations to discriminate becomes obsolete, as well as, the Navajo Nation Bill of Rights and all laws enacted for Navajo Courts by the Navajo Nation that traditionally values equality before their courts of 'persons' consistent with 25 U.S.C. 1302.

INTERVENING MATTERS NOT AVAILABLE AT THE TIME OF THE PETITIONERS' LAST FILING

After this case's last filing, the Solicitor General's office filed a reply brief on September 10, 2003 in *U.S. v. Lara*, Supreme Court docket no. 03-107. The Navajo petitioners here agree with and adopt the following Solicitor General's reply's assertions that 1) the Indian Civil Right Act (ICRA) provide mandates of equal protection within Indian Nation Courts[2]; 2) any defendant believing there is a denial of rights "may seek relief in tribal court itself" (Lara reply brief) which these respondents, including Truck and Mr. Ickes, failed to exhaust; 3) the House Committee confirms that Congress recognizes exercise of Indian Nation Court authority is one of inherent sovereignty [3]; 4) often the federal and state courts lack the resources to hear misdemeanor or civil Indian law questions that are required to be addressed for the security of the community (id.); and 5) the question of the root authority of Indian Nation Courts and thus this Court's Article III authority is ripe for resolution at this time [4].

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[2] "The Indian Civil Rights Act includes most of the specific protections of the Fourth, Fifth, Sixth, and Eighth Amendments, *as well as more general protections against denial of equal protection of tribal law* and against deprivation of liberty or property without due process of law. See 25 U.S.C. 1302."
Lara, reply brief.

[3] "The House Committee Report confirms that the amendment "is not a federal delegation of this jurisdiction but a clarification of the status of tribes as domestic dependent nations." H.R. Rep. No. 61. 102d Cong., 1st Sess. 7 (1991); see S. Rep. No. 168, 102d Cong., 1st Sess 4 (1991) (describing amendment as "recogniz[ing] and reaffirm[ing] the inherent authority of tribal governments to exercise criminal jurisdiction over all Indians"); H.R. Conf. Rep. No. 261, 102d Cong., 1st Sess. 3 (1991) (similar)."
Lara, reply brief

[4] "Here, because the Eighth and Ninth Circuits both reviewed the question [of Indian Court authority being inherent or a Congressional delegation] en banc, 22 appellate judges have had the

NEW DISTRICT COURT SPLIT
ON TRIBAL AUTHORITY

Two district courts are split over this same question of tribal taxing authority over non-Indians within 18 U.S.C. 1151 boundaries, based upon whether a Tribe retains inherent authority to tax or must have Congressionally delegated authority to tax. ***Reservation Telephone Cooperative v. Henry*** 2003 WL 22015786, Docket No. A4-02-121, A4-02-126 United States District Court, D. North Dakota, August 26, 2003 (no power to tax) and ***State v. Mineta,*** 2003 WL 21999399, Docket No. CIV. 02-3034, 2003 D.S.D. 16 United States District Court, D. South Dakota, August 21, 2003 (Secretary supports TERO tax).

NEWS RELEASES AND NEW REPORTS AS
INTERVENING EVENTS

On September 15, 2003, associated press, released survey results from a Utah American Indian/Alaska Native Education State Plan Advisory Committee report showing Utah Indian children lag behind 6 other states in education. The report found that in Utah "Indian people are still suffering from and have not healed from the North American conquest, nor the violent struggle to settle Utah, predominantly by members of (The Church of Jesus Christ of Latter-day Saints)." http://www.azcentral.com/news/articles/0915indianeduc

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opportunity to consider it, thereby assuring that the arguments on both sides have been fully explored. Those two Circuits, moreover, contain more than 80% of the recognized Tribes in the United States,1 thereby making prompt resolution of the conflict particularly appropriate."

Lara, reply brief

An excellent resource for Article III and Indian Nation authority is the United States Commission on Civil Rights Staff Memorandum on Constitutional Status of American Indians 1973, http://www.cwis.org/fwdp/Americas/civil.htm .

ation-ON.html The report found Utah Indian children suffer usually through invidious stereotyping and cultural insensitivity and history books with limited Indian history. This case exemplifies this reports' findings, by evidencing the respondents' callous racially intentionally hateful acts and attitudes toward the Petitioners, Navajo diabetic patients they intentionally drove from health care, and Navajo Court. These vicious attitudes permeate San Juan County, harming everyone, and retarding Navajo ability to enact and enforce their laws equally. Federal Court recalcitrance in enforcing the orders only magnifies the racially invidious harms and sets an extraordinarily tragic precedence for all federal courts in the future.

RECENT LEGISLATION

Several new acts involve inherent sovereignty. (1) On or about October 22, 2003 the Tribal Self Governance Act Amendments of 2003, are to have a legislative hearing (see the Senate Indian Affairs homepage). (2) Notably, 25 CFR 1000.4 for 2003 constitutes the funding agreements for the 1994 Tribal Self Governance Act and reiterates the findings that Indian Nations are entitled to self government, *flowing from inherent sovereignty.* Id. (3) S. 1542 Tribal Economic Enhancement Act of 2003 Sec. 2 Findings. (4) On September 10, 2003 executive comment was invited for S. 523. Senate Bill 523 addresses Indian sovereignty by amending the 1934 reorganization act as follows:

> `(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and
>
> `(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).'."

S.523 **Native American Technical Corrections Act of 2003 (Referred to House Committee after being Received from Senate)**

(5) S. 1526 Tribal Government Tax-Exempt Bond Fairness Act of 2003' [5]; and (6) S. 578 Tribal Government Amendments to the Homeland Security Act [6]. All Indian law, Congressional and Indian, becomes worthless unless Congress' plenary authority and Executive BIA contracts are enforced by Article III courts, supporting independent Indian Nation power without invidious presumptions.

CONCLUSION

Based upon the foregoing, Petitioners pray this Court to accept their Petition and permanently resolve these questions of national importance.

Respectfully submitted,

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[5] "Congress declares and affirms that–
Sec. 2 (1) The United States Constitution, United States Federal court decisions, and United States statutes recognize that Indian tribes are governments, retaining sovereign authority over their lands." Id.

[6] "(2) through statutes and treaties, Congress has recognized the inherent sovereignty of Indian tribal governments and the rights of Native people to self-determination and self-governance" Id.

(9)

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No. 02-1774

In the

Supreme Court of the United States

IN RE: FRED RIGGS, DONNA SINGER and AL DICKSON

A Petition for an Extraordinary Writ of Mandamus and Prohibition on appeal from the Tenth Circuit Court

PETITIONERS' PETITION FOR A REHEARING

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QUESTIONS PRESENTED

DID THIS COURT ERROR IN DENYING THE PETITIONER'S PETITION FOR A WRIT OF MANDAMUS BASED UPON THE FOLLOWING SEPARATION OF POWERS AND LACK OF SUBJECT MATTER JURISDICTIONAL ISSUES OF SUBSTANTIAL IMPORTANCE;

1) DOES THIS COURT OR ANY OTHER ARTICLE III COURT HAVE ANY CONSTITUTIONAL ORIGINAL JURISDICTION OR CONGRESSIONALLY DELEGATED OR OTHER LEGAL RESOURCES UPON WHICH TO RELY TO GRANT IT SUBJECT MATTER JURISDICTIONAL AUTHORITY TO DEMAND THAT AMERICAN TREATY-PROTECTED INDIAN COURTS CIVILLY DISTRIBUTE JUSTICE UNDER AMERICAN INDIAN LAWS BASED UPON RACE OR POLITICAL ASSOCIATIONS THEREBY SUPERCEDING CONGRESSIONAL AND EXECUTIVE BRANCH MANDATES OF EQUAL PROTECTION WITHIN INDIAN NATIONS?

2) IF THERE ARE NO LEGAL SOURCES THAT ALLOW ARTICLE III COURTS THE JURISDICTIONAL AUTHORITY TO DEMAND THAT AMERICAN INDIAN COURTS DISCRIMINATE IN THE CIVIL PROTECTIONS OF AMERICAN INDIAN NATION LAWS BASED UPON RACE OR POLITICAL AFFILIATIONS, THEN IS THIS COURT, AND ALL ARTICLE III COURTS, BOUND BY 28 U.S.C. 1738, AS 'EVERY COURT' WITHIN THE U. S. TO ENFORCE INDIAN NATION COURT ORDERS UNDER FULL FAITH AND CREDIT?

3) DOES CONGRESS HAVE THE AUTHORITY TO DEFINE THE TRUST FIDUCIARY RELATIONSHIP BETWEEN THE

FEDERAL GOVERNMENT AND THE INDIAN NATIONS BY DIVESTING INDIAN NATION'S OF THE ABILITY TO TREAT PERSONS DIFFERENTLY LEGALLY BASED UPON RACE OR POLITICAL AFFILIATION IN 25 U.S.C. 1302(8) IN THE BEST INTEREST OF THE BENEFICIARY, AND IF SO, DO ARTICLE III COURTS HAVE THE JURISDICTIONAL AUTHORITY TO SUPPLANT THOSE EXPRESS CONGRESSIONAL DIVESTITURES WITH THIS COURT'S MANDATE TO DEMAND AMERICAN INDIAN COURTS GIVE PRESUMPTIONS AGAINST JURISDICTION OVER ALL NON-INDIANS AS FOUND IN *MONTANA V. U. S.* AND ITS PROGENY ?

*REFERENCES TO THE PETITION FOR AN EXTRAORDINARY WRIT APPENDIX IS LISTED AS PET. FOR EW APP. .

PARTIES TO THE PROCEEDINGS

Petitioners

Mr. Fred Riggs, Navajo Nation enrolled member C# 18570, residing and working within the Navajo Nation, injured within the Navajo Nation borders.

Mr. Al Dickson, Navajo Nation enrolled member C#212,765, residing and working within the Navajo Nation, injured within the Navajo Nation borders.

Mrs. Donna Singer, married to a Navajo Nation member, residing outside the Navajo Nation, but injured while within the Navajo Nation borders.

All petitioners here are also petitioners in Docket No. 02-1253.

Respondents

San Juan County, 'County', constituent organization, organized under Utah Code 17-50-101 et seq. that SHALL control the San Juan Health Services District (§17A-2-1313(2)) and can withdraw powers from any District governance board member or employee at any time under Utah Code 17A-2-1326 (6).

San Juan Health Services District, 'District', constituent organization, organized under Utah Code 17A-2-1301 –1332.

San Juan County Commissioner Ty Lewis, officer of San Juan County, under Utah Code 17-16-6, and

previous San Juan Health Services District board member, named officially and personally.

San Juan County Commissioner Lyn Stevens, officer of San Juan County, under Utah Code 17-16-6 ,official capacity only, since January 1, 2003, under Navajo and Federal Rule of Civil Procedure at Rule 25.

San Juan County Commissioner Manuel Morgan, officer of San Juan County, under Utah Code 17-16-6, official capacity only, since January 1, 2003, under Navajo and Federal Rules of Civil Procedure at Rule 25.

Bill Redd, previous San Juan County Commissioner, and Health Services District board member, originally named personally and officially, and currently, personally only.

San Juan County Attorney Craig Halls, official under Utah Code 17-18-1, named officially and personally.

San Juan County administrator Richard Bailey and previous San Juan Health District CEO, under 17A-2-1313(2)(a), named officially and personally.

San Juan Health Services District administrative control board member, County appointed , Karen Adams, under Utah Code 17A-2-1326, named personally and officially.

San Juan Health Services District administrative control board member, County appointed, Grant Imel, under Utah Code 17A-2-1326 named officially only under Navajo and Federal Rules of Civil Procedure at Rule 25.

San Juan Health Services District administrative control board member, County appointed, Nettie Prack, under Utah Code 17A-2-1326, named officially only under Navajo and Federal Rules of Civil Procedure at Rule 25.

San Juan Health Services District administrative control board member, County appointed, Cleal Bradford, under Utah Code 17A-2-1326, named officially only, under Navajo and Federal Rules of Civil Procedure at Rule 25.

John Lewis, previous San Juan Health Services District administrative control board member, under Utah Code 17A-2-1326, named both officially and personally, and currently personally.

Roger Atcitty, Navajo Nation enrolled member, previous San Juan Health Services District administrative control board member, under Utah Code 17A-2-1326, named officially and personally, and now personally only.

Previously Commissioner Mark Maryboy and Patsy Shumway were named in their official capacities only, and have since left office and are no longer parties.

Reid Wood, previous San Juan Health Services District executive and employee, under Utah Code 17A-2-1313(2), named personally and officially, and currently personally.

Lauren Schafer is sued as an executive of San Juan Health Services District is named personally and officially.

John Hart, current San Juan District CEO, named official capacity only under Navajo and Federal Rules of Civil Procedure at Rule 25.

Truck/Farmer's Insurance Company the company who had a 1 million dollar bond on Montezuma Creek Clinic that covered Navajo employees at the clinic, and Navajo Respondent Roger Atcitty, and previous Navajo County Commissioner Mark Maryboy, and employed Mr. Ickes.

Mr. R. Dennis Ickes named in his personal capacity who was hired and represented the respondents, and interests of Truck Insurance.

And any other Jane and John Does, and any agent or assigns for the above named Respondents, all named jointly and severally.

All respondents, by implication or expressly, filed cross-petitions in Docket no. 02-1444 (County) and 02-1445 (District).

Undisputedly, all respondents in the initial Navajo Nation court action filed two answers, with counterclaims of fraud, theft and the like against Mrs. Singer, seeking Navajo Nation court protection. (EW P. Ap. 23a, 35a, 45a). These were FALSE counterclaims, but nevertheless, they were counterclaims wherein the Respondents paid the Navajo Court filing fee for Navajo Court services seeking Navajo protection for Navajo common law claims.

Additional Parties Below

Dr. Steven MacArthur, Michele Lyman, Helen Valdez, Candace Laws, Paul Kieth, Dorothy Kieth, Baxter Benally, Percy Mitchell, Melvin Capitan, Candace Holiday, Eva Pleasant, Amy Terlaak and Linda Cacapardo were additional *Federal* Court Plaintiffs, but were not parties to the Navajo Nation Court action.

Cleal Bradford, John Housekeeper, Gary Holiday, Dr. James Redd, Dr. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Laurie Wallace, Carla Grimshaw, Gloria Yanito and Julie Bronson were additional *Federal* Court defendants below, for *federal and state* claims, but were not parties to the Navajo Nation Tribal Court.

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ISSUE 3: CONGRESS HAS THE AUTHORITY TO DEFINE THE TRUST FIDUCIARY RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE INDIAN NATIONS BY DIVESTING INDIAN NATION'S OF THE ABILITY TO LEGALLY TREAT PERSONS DIFFERENTLY BASED UPON RACE OR POLITICAL AFFILIATION IN 25 U.S.C. 1302(8), AND ARTICLE III COURTS HAVE NO CONSTITUTIONAL OR CONGRESSIONAL BASIS FOR JURISDICTIONAL AUTHORITY TO SUPPLANT THOSE CONGRESSIONAL DIVESTITURES. 7

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PETITION FOR CERTIORARI AND OTHER PETITIONS

A petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit. Docket 02-1253 denied June 2, 2003. A petition for an Extraordinary Writ of Mandamus and Prohibition for enforcing the Navajo Orders under 28 U.S.C. § 1738 was filed as Docket no. 02-1774 and denied on October 6, 2003.

JURISDICTION

This Court has jurisdiction under Article III and by Supreme Court Rule 44 and by way of 28 U.S.C. §1738.

OPINIONS BELOW

The opinion of the United States Court of Appeals Tenth Circuit *MacArthur et al v. San Juan County et al*, 309 F.3d 1216 (10th Cir. 2002) is 10th cir. docket no. 01-4001 entered on October 7, 2002. The opinions of the United States Utah District court dismissing the respondents from the Navajo Court action on October 30, 2000 (P. E.W. Ap.p 169a), December 13, 2000 (P. E.W. App. 195a) is District Court docket no. 2:00 CV 0584. The four Navajo Court orders found in the Petition for an Extraordinary Writ of Mandamus found in the appendix at pages 1a-55a.

NEW CASE LAW-NEW COURT PETITION

After oral argument at the Tenth Circuit Court in this case, the Utah Supreme Court overturned the portion of the Utah Governmental Immunity Act relating to governmental discretionary functions, Utah Code Ann. § 63-30-2(4)(a), as in violation of Utah's open courts

provisions. This portion of the Utah code can not be relied upon to immunize the respondents.1

On September 30, 2003 this Court granted the petition in *U.S. v. Lara*, Docket no. 03-107. This case deals with Congressional authority, and thus the Court's authority also, to define Indian Nation jurisdiction in the criminal context. We are asking for this Court to also define these same jurisdictional parameters in the civil context.

LIMITATIONS OF THIS PETITION

Under Rule 44 -1 as substantial grounds not previously presented" and new case law on the question of the Constitutional separation of powers and subject matter jurisdiction of Article III courts to supercede Congress, the Executive Branch and American Indian Nations reserved inherent sovereignty mandates upon Indian Nation Courts to apply their laws equally to all 'persons' without consideration of race or political affiliations. Case law not presented previously will be presented here.

Separation of Powers Subject Matter Jurisdiction Challenge. The fact that the parties did not raise any question of Article III subject matter jurisdiction can not constitute a waiver since subject

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1 Further, Article VI makes treaties superior to all other law, even sections of the Constitution, save Congress limiting them by express acts such as the Indian Civil Right Act. See, *U.S. v. Forty-Three Gallons of Whiskey*, 1876 U.S. LEXIS 1368,*;93 U.S. 188; 23 L. Ed. 846;3 Otto 188 and *MacArthur* fn. 5.

> "A treaty, as the law of the land, is superior to any State legislation, and is valid even as a municipal regulation, until superseded by some act of Congress. Ware v. Hylton, 3 Dall. 236; Taylor v. Morton, 2 Curtis, C.C. 454; 1 Story on Const., sect. 1838; Worcester v. Georgia, supra."

Whiskey at LEXIS * 7-8

matter of the Courts can not be consented to and thus overridden by the parties. **"Such an error may be raised by a party, and indeed must be noticed *sua sponte* by a court, at all points in the litigation.... [citations omitted]"**. See, *Freytag et al v. Commissioner*, 1991 U.S. LEXIS 3818,*49-50;501 U.S. 868; 111 S. Ct. 2631;115 L. Ed. 2d 764. J. Scalia concurrence. There is no authority for an Article III Court to reject a subject matter jurisdictional question that is inherent in the Petitioners Petition for an Extraordinary Writ of Mandamus, equal protection and due process clause.

No less than Dred Scott in 1856, in *Scott v. Sanford*, 1856 U.S. LEXIS 472,*;60 U.S. 393; 15 L. Ed. 691;19 HOW 393, these petitioners are seeking to exercise their treaty-promised rights, immunities and privileges and protections under duly enacted and BIA-sanctioned Navajo law *as guaranteed* by 1) inherent sovereignty of the Navajo Nation to enact and enforce its own laws, and to apply the protection of those Navajo laws within Navajo borders equally under the United States-Navajo treaties of 1849 and 1868, 2) the United States-Navajo International Treaties of 1849 and 1868, 3) the International Treaties of the a) United Nations Charter Declaration Chapter IX on non-self governing Territories and b) United Nation International Covenant on Civil and Political Rights UNICPCR 2200A (XXI) of 16 December 1966 entry into force 23 March 1976 demanding Courts of the signature parties be open to 'everyone'; 4) the Indian Civil Rights Act 25 U.S.C. 3202(8), 5) executive order 13175 November 6, 2000 mandating that regulations and statutes be interpreted favorably as by the Indian Nations; 6) the BIA- Judicial Program contract that DEMANDS that the Navajo Nation apply Navajo law

in a uniform and fair fashion within its borders. All these sources of law unanimously MANDATE equal protection of Indian Nation law and presume Indian Nation Courts are capable of treating nonIndians fairly. There are no legal sources for an Article III court to override the Article VI 'supreme law of the land'.

THREE SEPARATION OF POWER JURISDICTIONAL ISSUES ARE INHERENT IN THE PETITIONERS' PETITION

ISSUE 1: THIS COURT OR ANY OTHER ARTICLE III COURT HAS *NO* CONSTITUTIONAL ORIGINAL JURISDICTION OR CONGRESSIONALLY DELEGATED OR OTHER LEGAL RESOURCES UPON WHICH TO RELY FOR SUBJECT MATTER JURISDICTIONAL AUTHORITY TO DEMAND THAT AMERICAN TREATY-PROTECTED INDIAN COURTS CIVILLY DISTRIBUTE JUSTICE UNDER AMERICAN INDIAN LAWS BASED UPON RACE OR POLITICAL ASSOCIATIONS THEREBY SUPERCEDING ARTICLE I CONGRESSIONAL AND ARTICLE II EXECUTIVE BRANCH UNANIMOUS MANDATES TO PROVIDE EQUAL PROTECTION OF THE LAW WITHIN AMERICAN INDIAN NATION GOVERNANCE.

APPLICABLE LAW IN SUPPORT OF SUPREME COURT AUTHORITY TO DEMAND THAT AMERICAN TREATY-PROTECTED INDIAN NATIONS DISCRIMINATE IN DISTRIBUTING THE PROTECTIONS OF INDIAN NATION LAWS BASED ON RACE OR POLITICAL AFFILIATIONS AS FOUND IN *U.S. V. MONTANA* AND PROGENY

The jurisdiction of the Supreme Court has two prerequisites to jurisdiction that must be present: first, the Constitution must have given the courts the capacity to receive it (*Marbury v. Madison*, 1803 U.S. LEXIS 352,*19-20;5 U.S. 137;2 L. Ed. 60;1 Cranch 137, and, second, an act of Congress must have conferred it

on the Court [2]. **There are no such Constitutional or Congressional legal resources to support the Article III Courts in presumptions against jurisdiction over non-Indians** based upon race or political affiliations as found in the special tests for non-Indians in *Montana v. U. S.*, 1981 U.S. LEXIS 9,*;450 U.S. 544;101 S. Ct. 1245;67 L. Ed. 2d 493 and its progeny.

Alternatively, *National Farmer's Union Insurance Co. et al v. Crow et al,* 1985 U.S. LEXIS 27, *, 471 U.S. 845; 105 S. Ct. 2447; 85 L. Ed. 2d 818 (1985) requires an Indian Nation Court jurisdictional analysis by examining "statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions." See, *MacArthur et al v. San Juan County et al,* 2002 U.S. App. LEXIS 20987, *34, 307 F.3d 1216. All unanimously support equality before Navajo Courts particularly for counterclaiming non-Indian respondents.

Currently, under Supreme Court rulings, if two Navajo members are civilly assaulted in the Navajo borders, if one is assaulted by a nonIndian, under a *Nevada v. Hicks*, 533 U.S. 353 (2001) ruling, there may be no relief. Under Congressional Indian Civil Rights Act mandate, both receive equal relief, particularly as here, if the non-Indian stipulates to the Indian Court jurisdiction by filing Indian common law counterclaims and FULLY litigating them.

The Tenth Circuit Court found "[25 U.S.C.] Section 1302 is an *express divestiture* of tribal authority [to discriminate], providing, among other things, that

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2 The *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cr.) 32, 33 (1812);

no Indian tribe may "deny *any person* within its jurisdiction the equal protection of its laws or deprive *any person* of liberty or property without due process of law." 25 U.S.C. § 1302(8); see also *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 57, 56 L. Ed. 2d 106, 98 S. Ct. 1670 (1978) [*22] (stating that in § 1302, "Congress acted to . . . impose certain restrictions upon tribal governments similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment"). " *MacArthur*, *21-22 .

ISSUE 2: IF THERE ARE NO LEGAL SOURCES THAT ALLOW ARTICLE III COURTS THE AUTHORITY TO DEMAND THAT AMERICAN INDIAN COURTS DISCRIMINATE IN THE CIVIL PROTECTIONS OF AMERICAN INDIAN NATION LAWS BASED UPON RACE OR POLITICAL AFFILIATIONS, THEN THIS COURT, AND ALL ARTICLE III COURTS, ARE BOUND BY 28 U.S.C. 1738.

There is no legal source of law upon which the Supreme Court or any other Article III Court can rely to avoid being included in the term 'every Court' for enforcing the laws of "states, territories and possessions." 28 U.S.C. §1738 an Art. III duty.

The Ninth Circuit of *Wilson v. Marchington*, 1997 U.S. App. LEXIS 25994,*4;127 F.3d 805; 97 Cal. Daily Op. Service 7553;97 Daily Journal DAR 12175 labeled several hundred American Indian Nation sovereigns as 'foreign countries'. Ms. Piestewa, Mike Nolene, and Fred Riggs' Uncle died in American wars for both their Native *American* Nations. Art. I sec. 8 clearly identifies "Indian tribes" as distinct from "foreign countries".

Halwood v. Cowboy Auto Sales, 946 P. 2d 1088 (N. M. s. ct. 1997) cert. denied docket no 98-858 Feb. 22, 1999 is exactly opposite of *Marchington*. Both *Halwood*

and *Marchington* were refused Certiorari and present a split in authority for enforcement of American Indian Court orders that should be addressed now, and can be addressed now, as a jurisdictional issue.

ISSUE 3: CONGRESS HAS THE AUTHORITY TO DEFINE THE TRUST FIDUCIARY RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE INDIAN NATIONS BY DIVESTING INDIAN NATION'S OF THE ABILITY TO LEGALLY TREAT PERSONS DIFFERENTLY BASED UPON RACE OR POLITICAL AFFILIATION IN 25 U.S.C. 1302(8), AND ARTICLE III COURTS HAVE NO CONSTITUTIONAL OR CONGRESSIONAL BASIS FOR JURISDICTIONAL AUTHORITY TO SUPPLANT THOSE CONGRESSIONAL DIVESTITURES.

LEGAL SOURCES SUPPORTING CONGRESSIONAL AUTHORITY TO DEFINE THE TRUST RELATIONSHIPS BETWEEN THE UNITED STATES AND INDIAN NATIONS

"The source of federal authority over Indian . . . derives from federal responsibility for regulating commerce with Indian tribes and for treaty making." *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164, 172 n. 7 (1973). See also *Morton v. Mancari*, 417 U.S. 535, 551 -553 (1974). Article I section 8 provides for Congress ".. To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof". If Congress would have believed Indian Nations should give a preference against jurisdiction over an Indian law cause of action based on the race or political affiliations of the parties, Congress could have so said, did not, and in fact said the opposite in 25 U.S.C. 1302(8), Congress

desires to keep and preserve Treaty promises and guarantees. 25 U.S.C. §71.

"...[A]mbiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity." *Ramah Navajo School Board v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 838 (1982). In *Montana*, Petitioners assert this Court effectively negated Congress' acts made in the best interest of the fiduciary beneficiary, making non-Indians and states the new beneficiary of a heretofore unknown fiduciary duty for federal courts to protect.

See, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65- 66 (1978).

> "Tribal forums are available to vindicate rights created by the ICRA, and 1302 has the substantial and intended effect of changing the law which these forums are obliged to apply. Tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of **both Indians and non-Indians**. See, e. g., Fisher v. District Court, 424 U.S. 382 (1976); Williams v. Lee, 358 U.S. 217 (1959). See also Ex parte Crow Dog, 109 U.S. 556 (1883). Nonjudicial tribal institutions have also been recognized as competent law-applying bodies.

Id. *See also*, fn. 20-22. [3] Emphasis Added.

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3 Congress and the Executive presumes Indian Judges can be fair to all persons, this Court does not and has not since the divestiture

FURTHER REASONS FOR GRANTING THIS PETITION FOR A REHEARING

One widely accepted definition of genocide is found in the **Convention on the Punishment and Prevention of the Crime of Genocide Article II referring to** "(b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; ". The respondents were fully aware that billing I.H.S. and Medicaid patients were driving them from their care at Montezuma Creek clinic on or about May 14, 1999. Pet. For E. W. at 46a. Despite this full knowledge, the respondents kept billing them and preying upon their ignorance and fears with full knowledge of their harms. Petitioners have no idea how many patients have been without their required constant meds such as anti-depressants, TB medication, and the like dialysis numbers are up. Pet for EW app. 146a - 148a.

The Navajo Judge fact finder is in the best place to understand how to best provide relief for Navajo law violations and Indian Civil Rights Act violations. *Santa Clara* at fn. 20-22.

"We are all too often reminded that "**justice delayed is justice denied.**"" *McMullin v. Bay Ship Management*, 2003 U.S. App. LEXIS 12609,*9-10;335 F.3d 215;55 Fed. R. Serv. 3d (Callaghan) 1193. Judicial

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doctrine in *Oliphant v. Swuamish Indian Tribe*, 1978 U.S. LEXIS 66, *26; 435 U.S. 191; 98 S. Ct. 1011 through *Nevada v. Hicks* in 2001. Since 1978 through today, Congress and the Courts have gone their separate ways. Federal funding that can be removed from Indian Judicial programs for unfair treatment is substantial financial incentive to provide fair and uniform protection of Indian Nation laws.

economy in all courts across the country is fostered by examining Congress' authority in civil Indian law *at the same time* as Congress' authority in criminal law as in *U.S. v. Lara*, docket no. 03-107.

CONCLUSION

Based upon the foregoing, Petitioners pray for the Court to reevaluate their decision to not grant their petition, not give them an opportunity for redress to enforce their Navajo Court orders, and to further subject them to years of appeals at great expense.

Respectfully submitted,

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(Navajo Counsel on the Brief)

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CERTIFICATE OF THE GOOD FAITH OF THE ATTORNEY

I, Susan Rose, counsel for the Petitioners, hereby certify that this petition for a rehearing is not being brought for the purposes of delay or in bad faith. Further, this petition is brought in the interest of the highest judicial economy for hundreds of federal and American Indian Nation Courts and the Petitioners who will be subjected to years of appeals if the conflicts here are not addressed at this time.

Respectfully Submitted,

Susan Rose, Attorney for the Petitioners.